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No. 84- .

In the
Supreme Court of the United States.

OCTOBER TERM, 1984.

ALLAN WILK AND PALOS VERDES SHORES MOBILE ESTATES, LTD.,
APPELLANTS,

v.

PEOPLE OF THE STATE OF CALIFORNIA,
APPELLEE.

ON APPEAL FROM
THE APPELLATE DEPARTMENT OF THE SUPERIOR COURT,
STATE OF CALIFORNIA, COUNTY OF LOS ANGELES.

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Questions Presented.

1. Whether the First and Fourteenth Amendments are violated by a vague business regulation's two-track enforcement system under which only those alleged offenders who are vocal protesters, and whose public statements about the regulation the government deems objectionable, are denied a formal opportunity to avoid criminal prosecution by acceding to the government's reading of the regulation and thenceforth acting accordingly.

2. Whether the free speech and due process clauses have been violated where an individual was prosecuted on a regulation's "fast track," without the warning and compliance opportunity he would otherwise have received, solely because the government deemed his protest to the regulation "outrageous" and "bizarre" in content.

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ON APPEAL FROM
THE APPELLATE DEPARTMENT OF THE SUPERIOR COURT,
STATE OF CALIFORNIA, COUNTY OF LOS ANGELES.

Jurisdictional Statement.

Appellants are Allan Wilk and his business, Palos Verdes Shores Mobile Estates. They stand convicted as violators of a local rent control law under which only vocal protesters — those whose public statements about the law the government deems unreasonable — are denied a formal opportunity to avoid criminal prosecution by acceding to the government's reading of the law and thereafter acting accordingly. Because

he was someone whose protest to the law the government found "outrageous" and "bizarre" in content, Wilk was prosecuted on the law's "fast track" — that is, without the warning and compliance opportunity he would otherwise have received. The courts below construed the law's two-track enforcement system — one track for the silent, one for "unreasonable" dissenters — as fully authorizing that treatment of Wilk. Specifically, Wilk's publicly stated views were deemed by the trial and appellate courts to bring him within the enforcement system's express provision for immediate prosecution where "aggravated circumstances" warrant withholding the avoidance opportunity otherwise available.

Whatever the limits of government power to focus prosecutory efforts on self-proclaimed offenders — an issue pending before this Court in *Wayte* v. *United States*, No. 83-1292 — the First Amendment surely constrains the government's authority to segregate persons already identified as alleged offenders into two groups based on the content of their speech, and to deny an opportunity for *de facto* amnesty to the group whose speech is deemed substantively objectionable by government officials. This case provides a timely opportunity for the Court to consider those constraints.

Opinions Below.

The decision of the Appellate Department of the Superior Court of California, County of Los Angeles, dated February 9, 1984, from which this appeal is taken, is unreported and is reprinted as Appendix A. The Appellate Department decision affirmed the judgment of conviction entered by the Municipal Court of the Los Angeles Judicial District, County of Los Angeles, State of California. The municipal court's oral ruling

denying defendants' motion to dismiss, issued on June 24, 1982, is reprinted as Appendix B.

Jurisdiction.

The appellants were convicted by the Municipal Court of the Los Angeles Judicial District on several counts of violating the Los Angeles Rent Moratorium Ordinance after that court denied appellants' motion to dismiss. See App. B. The Appellate Department of the Los Angeles Superior Court affirmed those convictions on February 9, 1984, upholding over appellants' First and Fourteenth Amendment attacks the Ordinance and the system promulgated for its enforcement and holding that appellants' exercise of their First Amendment rights was a proper basis for their automatic prosecution under that enforcement system as the court construed it. See App. A. A petition for a writ of *certiorari* or mandate was denied by the Second Appellate District of the California Court of Appeal on May 9, 1984. See App. C. The decision of the Appellate Department upholding the local statute over federal constitutional challenge became final on June 21, 1984, upon the denial of appellants' petition for hearing by the California Supreme Court. See App. D. A Notice of Appeal to this Court from that judgment was timely filed in the Appellate Department of the Los Angeles Superior Court on September 4, 1984. See App. E. On September 10, 1984, the Circuit Justice for the Ninth Circuit extended the time within which to docket this appeal to October 18, 1984. See App. F. This appeal has been docketed within that time. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(2).

Constitutional and Statutory Provisions Involved.

The First Amendment to the United States Constitution provides in relevant part:

> Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people . . . to petition the Government for a redress of grievances.

The Fourteenth Amendment to the United States Constitution provides in relevant part:

> No State shall . . . deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Los Angeles Rent Moratorium Ordinance, LAO No. 151,415, is reprinted in relevant part as Appendix G. The Rent Roll-Back and Freeze Ordinance Case Procedures and the Rent Ordinance Filing Guidelines, promulgated by the City to implement the Ordinance, are set out in relevant part as Appendices H and I.

Statement of the Case.

The relevant facts are not in dispute. At their trial for violations of the Los Angeles Rent Moratorium Ordinance ("the Ordinance"), appellants Palos Verdes Shores Mobile Estates, Ltd. ("PVS") and its sole general partner, Allan Wilk (appellants will be jointly referred to as "Wilk" or "appellant"), argued that they had been singled out for prosecution by the

Criminal Branch of the City Attorney's office because of Wilk's vigorous opposition to the enactment and application of the rent control ordinance, which Wilk challenged as unconstitutionally vague both as written and as applied to him. The Criminal Branch's announced policy in enforcing the law was to forego prosecution for past violations in exchange for future compliance. (App. 39.)[1] Written procedures promulgated by Los Angeles through the City Attorney normally required an informal office hearing and a formal letter demanding compliance before criminal charges could be filed. The appellant — alone among 443 cases — was accorded neither part of the prosecution's "beg policy."

The trial court dismissed appellant's arguments, noting an exception in the regulatory scheme that expressly allowed the prosecutor to dispense with the beg policy in "aggravated circumstances." (App. 37, 39.) The court concluded that the prosecutor had correctly construed and applied the Ordinance when he denied appellant the normally required hearing and warning on the express ground that Wilk's letters to the Los Angeles City Council were, in the court's words, "blatant" in their opposition to the Ordinance, leaving "no question [Wilk] is against rent control." (App. 28-29.)

The Appellate Department of the Los Angeles County Superior Court ("the appellate court") upheld the Ordinance over appellant's arguments that it was "unconstitutionally vague" (App. 25) and that he "should have been given an opportunity to comply with the ordinance before the charges were brought." (App. 18.) That court held that "[i]t is true that Wilk in being outspoken against the ordinance was exercising his First Amendment rights, but his adamant attitude

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[1] References to documents contained in the Appendix will be cited as "App" followed either by the letter designating the particular portion of the Appendix or by the appropriate page number.

also was a legitimate basis for not providing [him] with [the] informal hearing" and formal warning normally prescribed in the guidelines. (App. 19.)

The Los Angeles Rent Moratorium Ordinance, that city's first experience with any type of rent control since the Second World War, provided that, as of October 1, 1978, existing rents in the City should be rolled back to their May 31, 1978 levels for those tenants who had occupied their "rental units" on that date. (App. 34.) Criminal penalties of fines and imprisonment were provided for all violations of the Ordinance. From the moment it was enacted by the City Council on August 30, 1978, the Ordinance engendered confusion on the part of landlords and city officials. (RTM (1B) 57-59.)[2]

In light of this confusion, and because the goal of the Ordinance was to induce prospective compliance with the rent roll-back rather than to punish non-compliers (RTM (1A) 32), the City Attorney drafted and publicized (RT 845; CR 10-Exh.X), an elaborate two-track rent control enforcement system (hereafter the "Two-Track System") for implementing the Ordinance, which included Rent Roll-Back and Freeze Ordinance Case Procedures and Rent Ordinance Filing Guidelines. See App. H, I.[3] The Two-Track System included what has come to be known as a "beg policy:"[4] "A criminal complaint alleging

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[2] References to the Reporter's Trial Transcript will be cited as "RT", followed by the appropriate page number. References to the Reporter's Transcript of Appellants' Pretrial Motion to Dismiss will be cited as "RTM", followed by the appropriate transcript volume and page numbers. The Clerk's Record is cited as "CR", followed by the docket control number of the Appellate Department and the appropriate page or exhibit designation.

[3] The City Attorney developed a full array of special forms for administering this enforcement scheme, including "Hearing Mail-Grams," "Case Cards," "Special Case Tracking Forms," "Complaint Withdrawal Forms," "Landlord Advising Forms," "Landlord Reply Forms," "Office Hearing Scheduling Forms" and "Demand Letter to Cease Violation."

[4] *See* Brief for the United States in *Wayte* v. *United States*, No. 83-1292, at 5 & n.2. A "beg" policy is an enforcement scheme that asks violators to

violation of [the Ordinance] will be filed only after efforts to achieve voluntary compliance have failed." (App. 39.) Upon identifying those individuals believed to be violating the Ordinance, the Criminal Branch of the City Attorney's office would not automatically file a criminal complaint. Instead, an informal office hearing was held to confront the landlord, explain the requirements of the law, discuss the landlord's interpretation of it, and achieve compliance if possible. (App. 2, 37-39; RTM (1A) 32.) If the landlord still refused to comply, then the City Attorney wrote a formal letter demanding prompt compliance on pain of criminal prosecution (App. 3; RTM (1A) 31.) Even if no informal hearing were held because it seemed clear that the landlord understood the law and simply refused to obey, a formal letter of warning was nonetheless sent to provide the landlord a "last clear chance" to go along and thereby avoid any risk of criminal prosecution.[5] In what the Two-Track System called "particularly aggravated circumstances" (App. 37, 39) — that is, where the landlord's lack of compliance was based on a publicly proclaimed view of the Ordinance which the prosecutor characterized as "specious" (RTM (1A) 31), or "off in some never-never land," *id.*[6] — the Two-Track System provided that criminal charges

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comply prior to filing charges and that rewards prospective compliance with *de facto* exoneration for past violations.

[5] The Criminal Branch attorney who processed all of the Ordinance cases testified that only three out of 443 cases reviewed by the City Attorney under the Two-Track System were not set for an office hearing — Wilk's and two others. (RTM (1A) 33.) The other two cases involved landlords who were said to be intentionally and blatantly violating the Ordinance, *id.* at 34-35; yet even they were evidently sent formal "We-really-mean-it" letters before charges were filed. *Id.* at 32. When the trial court ordered the production of the files of these other two cases, the City Attorney claimed to have lost them. Thus there is absolutely no evidence that the City Attorney failed to follow the standard procedure of giving these two landlords a last chance to comply.

[6] Although this equation of "aggravated circumstances" with the public expression of "specious" arguments by the landlord originated in the City Attor-

would be filed immediately, without first giving the individual an opportunity to conform his conduct to the prosecutor's reading of the Ordinance. It was this latter, fast-track procedure that was concededly employed against appellant Wilk (RTM (1A) 30-31), with the subsequent approval of both the trial (App. 29), and the appellate courts. (App. 3, 19.)

Appellant's substantive objection to the rent moratorium was that, when he had purchased PVS — an expensive, "five-star" mobile home park (RT 770) — the year before, he had struck a bargain with the residents whereby he would invest $300,000 or more (RT 807) to upgrade the Park's deteriorated amenities and athletic facilities in exchange for agreement by the residents to a schedule of future rent increases needed to bring the rents up to market level and pay for the improvements.[7] The first of those scheduled rent hikes was announced by appellant in April of 1978, to become effective in July of that year — after the roll-back date, later set by the City Council, of May 31, 1978, on which rents were to be frozen under the Ordinance enacted August 30, 1978. Thus the effect of the proposed Ordinance would be to roll back PVS' rents to the levels that had been set in July of 1977 — before Wilk began the expensive upgrade program — thereby depriving appellant, without compensation, of the agreed-upon rent increases needed to recoup Wilk's investment in the improvements. (RT 829-30.) Indeed, some residents approached Wilk after the moratorium was proposed and volunteered to pay the

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ney's office (RTM (1A) 31-32), it was confirmed by the courts below (App. 3, 19, 28-29) as a correct reading of the Two-Track System.

[7] When Wilk and his partners bought PVS, the Residents' Association was in the process of suing the previous owners over the condition of the Park's amenities. (RT 769, 806). Wilk met with the residents after the purchase of the Park and they approved his proposal for upgrade and increased rents. (RT 807-09).

increased rents they had previously agreed to in their bargain. (RT 781-2, 875-6.)

On August 24, 1978, the day after the Ordinance was proposed by the City Council, Allan Wilk took issue with the proposed rent moratorium in a letter to his tenants (App. J), which was drafted with the assistance of his real estate attorney. (RT 874). Wilk questioned the City Council's wisdom, denounced the Ordinance as unconstitutional, and promised to litigate the matter with all his resources. Appellant further announced a $50-per-month hypothetical rent increase and said that every six months until the Ordinance was repealed or invalidated (if ever) he would announce further increases, which he hoped eventually to collect, to finance litigation against the Ordinance. But he conceded that such increases could not actually be collected so long as the Ordinance was in effect. Wilk's letter explained that those residents who wished to pay voluntarily the scheduled rents to which they had previously agreed, rather than the much lower July, 1977 rent levels the Ordinance's roll-back would retroactively impose, were free to do so, and that in return for their honoring their side of the bargain, Wilk would not, after the Ordinance was lifted, impose on *them* the $50-per-month increase he would impose on others. In order to get his message across to the govenment, Wilk sent a copy of this letter to each member of the City Council. (RT 831, 885; RTM (2A) 11.)

On September 25, 1978, Wilk sent a second letter to his tenants (App. K), informing them that he had since been advised by counsel that the Ordinance would prohibit him from accepting even any voluntary payments in excess of the rolled-back rent levels, despite the residents' prior agreement and desire to make such payments and despite the bargained-for investments Wilk had made in exchange for that agreement. Park residents would therefore be billed only for the rents allowed under the Ordinance as of October 1, 1978, the law's

effective date. Wilk again promised to take the Ordinance to court, and urged his tenants to sign a petition against rent control and make themselves heard. Copies of this letter were also distributed to the members of the Council. (RT 893.)

On October 1, despite heated controversy as to whether the Ordinance applied at all to rents on mobile home ground lots, such as those rented by PVS (RTM (1B) 23-24),[8] appellant voluntarily rolled rents back to the levels prescribed by the Ordinance for all Park residents who had been renting ground space from him on the relevant date, May 31, 1978. This accounted for 235 of Wilk's 240 tenants. (RT 834, 839.) Wilk continued to accept increased rental payments from the remaining five residents, who had moved into the Park after May 31, 1978 (RTM (1A) 47-48, 51), because of his belief (RT 839), based on the advice of his attorney (RT 840), that such residents were simply not covered by the Ordinance.[9] In order

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[8] Wilk's position that the Ordinance did not apply was based in part on his counsel's opinion that, insofar as lot rentals were concerned, the Ordinance was preempted by comprehensive *state* regulation of the mobile home industry. (RT 772); *see* Cal. Mobile Home Residency Law, Cal.Civ.Code § 798 *et seq.* and the Mobile Home Parks Act, Cal.Health & Safety Code § 18200 *et seq.* This issue was finally resolved on November 17, 1978, when the City Council amended the Ordinance to expressly include such lot rentals. (RT 785; RTM (1B) 23). This was the Mobile Home Amendment, LAO 151,705. (CR 10-Exh.M.) According to the staff attorney who drafted the Ordinance and "handled rent control matters" for the City and the Civil Branch (RTM (2A) 44), a number of such "clean-up amendments" (RTM (2A) 48), was necessary to address particular problems which had "cropped up." *Id.*

[9] The pertinent portion of the Ordinance is as follows: "Beginning on the effective date of this Ordinance [October 1, 1978] . . . rents shall not be increased except as provided in Subsection B(3) . . . For a rental unit voluntarily vacated on or after June 1, 1978 and prior to the end of the moratorium: If the vacancy was voluntary . . . then the rent may be increased upon the re-rental of the rental unit. So long as such unit continues to be rented to one or more of the same persons, such rent shall not exceed that in effect on the date the rental unit is re-rented . . .." §§ 3(A), (B)(3). The five new residents who moved into the Park after May 31, 1978, were given notice on August 24,

to clear up the confusion over mobile home lots, Wilk filed suit in state court on October 2, 1978, for a judicial declaration of the status of mobile home lot rentals under the Ordinance (CR 10-Exh.I; RT 841; RTM (1A) 57-58.)[10]

Even before appellant sued the City, City officials were aware of his opposition to the Ordinance because Wilk had mailed copies of his August 24 letter to the members of the City Council. (RT 831, 885.) As a result, appellant's case did not go through the usual Housing Office channels but instead received personalized attention from the City Attorney's office. Some copies of Wilk's letter were forwarded by Council members to the City Attorney for investigation. (CR 10-Exhs. B, E; RTM (1A) 37, (1B) 61, 62, 64.) The letter was soon circulating among City government offices (RTM (1A) 41), provoking a fairly uniform negative response.

A copy of the letter was sent by the City Attorney to the district attorney for the Palos Verdes area because that office was "seriously concerned with the attitudes expressed by [Wilk]." (CR 10-Exh. F.)[11] On September 18, the chief of the City's Criminal Branch conferred with his counterpart in the Civil Branch on the matter and termed Wilk's attempts to

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1978 — directly or through their predecessors — that a general rent increase would go in effect November 1, 1978. This sixty-day advance notice was required by state law. Cal.Civ.Code § 798.30. The rents in question were thus increased to new tenants before the proposed Ordinance was even signed into law; those increases simply were not collected upon occupancy by the new residents but only began to show up on rent bills on November 1, as a courtesy from Wilk to his new tenants. (RT 839-40).

[10] A second civil action was filed in January of 1979 to test appellant's belief that the Ordinance's roll-back provisions did not apply to those residents who had moved into the Park after May 31, 1978. Both of these actions have yet to go to trial.

[11] At one point the City Attorney even considered filing extortion charges against Wilk based on the August 24 letter (CR 10-Exh. F), but eventually concluded that such prosecution was utterly without merit. (RTM (1B) 67-8).

organize opposition to the Ordinance and to persuade his tenants to honor their previous bargain on increased rents an "outrageous" "challenge to the Ordinance." (RTM (1B) 64-65.) In a memorandum to the City Attorney, he sarcastically expressed his "hope [that] we can provide [Wilk] with an opportunity to test the validity of the Ordinance shortly after its effective date." (CR 10-Exh. E.) The chief of the Criminal Branch promised the City Attorney that he would keep in touch with the Civil Branch as to any civil lawsuits which might be filed against the Ordinance. (RTM (1B) 69.)

The prosecuting attorney specifically responsible for reviewing Ordinance violation complaints knew before he considered filing criminal charges against appellant that Wilk was suing the City over the Ordinance. (RTM (1A) 57, (1B) 19, 29.) He was also aware that Wilk maintained that the Ordinance did not apply to the renting of mobile home ground spaces (RTM (1B) 24), and that even if it did, it still did not require the roll-back of rents of those residents who moved into the Park after May 31, 1978 (RTM (1B) 21-22), a reading of the law the Criminal Branch considered specious. (RTM (1B) 24, 43.)

By their own account, the prosecutors scrupulously followed the special fast-track procedures in handling Wilk's case. (RTM (1B) 5-8.) They did not deem it necessary actually to contact Wilk or any representative of his business about compliance with the Ordinance because the prosecutors had read Wilk's letters. (RTM (1B) 7.) Everyone in the prosecutor's office concurred that, on the basis of Wilk's letters, there was no reason for an informal office hearing, and that his case was therefore a proper one for application of the explicit "aggravated circumstances" exception to the "beg policy" embodied in the Two-Track System. (RTM (1B) 71.) The prosecution knew that appellant believed the Ordinance did not apply at all to mobile home lot rentals and certainly not to those residents who had moved into the Park after May 31, 1978 — a reading of

the law with which the prosecution disagreed — yet admittedly made no attempt to contact appellant in order to correct what it believed to be appellant's misapprehension of the Ordinance. (RTM (1B) 7-8, 12, 22.)

In applying the "aggravated circumstances" exception to deny appellant both an informal hearing *and* a formal offer to submit, under protest or otherwise, to its interpretation of the law in return for non-prosecution, the Criminal Branch found it sufficient that it considered Wilk's public statements about the Ordinance "very bizarre" and difficult to understand. (RTM (1B) 43.) As it turns out, most of the prosecutors' differences with appellant over how to interpret the Ordinance were ultimately resolved in Wilk's favor.[12]

It is undisputed that the prosecution never made any attempt to contact appellant to obtain compliance with its reading of the Ordinance prior to filing criminal charges (RTM (1B) 7, 8, 13; RT 842, 848.) No office hearing was held because "we [the Criminal Branch] would file anyway." (RTM (1B) 17-18.) At trial, the Criminal Branch attorney in charge of all rent control cases candidly testified that appellant's alleged violations of the Ordinance were "not the sum total of the reasons

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[12] From the start the prosecution disparaged doubts that the original Ordinance applied to rents on mobile home lots (RTM (1B) 38-9), yet the City Council felt it necessary to amend the Ordinance to cover such rents, and the ten criminal counts based on collection of those rents prior to the effective date of the amendment were dismissed. It was equally obvious to the prosecution that the Ordinance required the roll-back of golf course access fees as essential "housing services" (RTM (1B) 25), yet this was less clear to the jury which acquitted appellant on all 13 such counts despite uncontroverted evidence that he had in fact doubled or tripled the green fees. (CR 24.) Finally, the prosecution refused to drop the original counts even after appellant refunded all of the overcharges, in part because appellant "wouldn't budge an inch" on his "unreasonable" position that the Ordinance permitted him to raise the rent when a resident sub-let his mobile home (RTM (1B) 35, 41), yet the trial court again sided with appellant and dismissed all such counts. (RT 752-3, 765.)

for the filing of a [criminal] complaint against Mr. Wilk." (RTM (1B) 27.)

On February 26, 1979, a criminal complaint was filed against appellant charging him with twenty violations of the Ordinance, all related to the five Park residents who had occupied after May 31, 1978, and from whom appellant had collected increased rents upon the advice of his attorneys, noted specialists in mobile home regulation. (RT 767, 866-74, 893-94; RTM (2A) 5.) The criminal charges took Wilk completely by surprise (RT 848), since he was well aware of the beg policy from media publicity and had no reason to suppose that he was eligible for the fast-track exception to that policy. (RT 845.) Indeed, Wilk had learned of the beg policy through representations made to his trial attorney during Wilk's civil suit against the Ordinance. (RT 787, 798, 841-2, 845, 960-61.) Within a week after being criminally charged (on March 5, 1979) appellant refunded the entire sum of allegedly illegal rent payments to the five residents. (RT 129, 150, 178-79, 212-14, 241-42, 849-51, 879-80.) The prosecution admitted that appellant was now in full compliance on every count charged in the original complaint. (RTM (1B) 41.)

Counsel for appellant wrote to the City Attorney and attended an office meeting in order to resolve the confusion over the Ordinance's terms and have the criminal charges dropped. (RTM (1B) 32-33, 35.) Despite the fact that the prosecutors had by their own appraisal achieved their original objectives in filing the charges, *id.* at 41, criminal prosecution was pursued because appellant "refused to budge an inch" on two *new* areas of disagreement about the Ordinance. *Id.*[13] In late March 1979, an amended complaint was filed adding sixteen new counts for alleged violations involving golf course fees and sub-letting. (CR 1.) The three counts dealing with sub-letting

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[13] See n.12, *supra*.

were dismissed by the trial court. The jury acquitted appellant on the thirteen counts concerning increased golf fees. Ten of the original twenty counts were dismissed because they concerned increased rents demanded of the five most recent tenants in November and December of 1978, before the Ordinance had been amended to apply expressly to rents on mobile home lots. Appellant was convicted on the remaining ten counts of overcharging, after December 1978, the five residents who had moved into the Park after May 31, 1978. Those convictions were upheld on appeal over appellant's First and Fourteenth Amendment objections to the Ordinance, the Two-Track System, and the decision to prosecute him on the system's fast track — without first "begging" for prospective compliance.

The Questions are Substantial.

This case gives the Court an opportunity to clarify several of the problems which have arisen with growing frequency from the criminal prosecution of businessmen for alleged violations of economic regulations. *See Developments in the Law — Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions*, 92 Harv. L. Rev. 1229 (1979). Of particular significance is the fact that this case involves *both* (1) a prosecutorial beg policy, whereby violators are not prosecuted until they have been given a last clear chance to comply in return for *de facto* amnesty as to pre-warning violations; *and* (2) a *fast-track exception* to that beg policy, whereby this compliance offer is withheld from anyone whose publicly expressed views of the law or of the prosecution's reading of it strike the enforcing authorities as offensive or untenable.

This case raises issues that complement the question posed in *Wayte* v. *United States*, No. 83-1292, scheduled for argument

on November 6, 1984 — issues likely to be of recurring significance in the growing array of regulatory regimes that employ one or another variant of a beg policy. In *Wayte*, this Court has agreed to consider whether vocal protest to a law may be used as the trigger for *identifying* violators — who will then *all* receive warnings and compliance offers — given a "passive" system of enforcement that deliberately leaves the government unaware of the identities of *silent* non-compliers. The closely related issue posed by *Wilk* is whether, within a set of persons *already identified* by the government as non-compliers, vocal protest may be used as the trigger for *automatic prosecution* in a regime which otherwise systematically foregoes prosecuting prior non-compliers who promptly conform their conduct to the government's reading of the law once they are individually notified that they face imminent criminal sanctions unless they do so.

Put another way, *Wayte* poses the question whether, in a "comply-or-else" system, *intake* to the enforcement channels may be limited to those who are vocal about their violations — that is, whether the government's omission to pursue a policy of active enforcement may in certain circumstances itself violate the First Amendment. *Wilk* presents the companion question whether, in such a "beg" system, the "last-chance-to-comply" opportunity to avoid prosecution may be denied to individuals whenever they have publicly voiced opposition to the regulation, or have expressed an intent to contest its legality or its applicability to their conduct, with arguments that the prosecutor deems specious.[14]

Even if the Court of Appeals for the Ninth Circuit were to be affirmed in *Wayte*, the core question here would remain a

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[14] The government asserts in *Wayte* that even vocal non-compliers were given a chance to comply and thereby avoid prosecution. (Brief for the United States at 29.)

serious and significant one. For, according to the government, the passive enforcement system upheld by the Ninth Circuit is triggered by *any* statement that acknowledges *guilt*. (Brief for the United States at 3 & n.6, 30-31.) The system at stake in this case, by anyone's description, is triggered by the *content* of vocal opposition to the law *even when the speaker acknowledges no guilt*.

Thus the prosecutorial system upheld below is indisputably content-based, however one describes that at issue in *Wayte*. And, unlike the system upheld by the Ninth Circuit in *Wayte* as viewed by the government (Brief for the United States at 34, 38), the Two-Track System cannot even arguably be said to serve any neutral purpose such as that of sparing the government added enforcement efforts by focusing on those whose intentional violation is openly acknowledged. For prosecution is obviously more burdensome to government than a form letter demanding compliance: such a letter would cost about 20 cents plus postage. One interest and one only is served by *not* sending such a letter — the constitutionally illicit interest in silencing public dissent from the government's policies and positions.

I. The Los Angeles Rent Moratorium Ordinance and its Two-Track Enforcement System Violate the First and Fourteenth Amendments Insofar as They Empower Prosecutors to Deny an Otherwise Routinely Available Avoidance Opportunity to Those Who Oppose or Protest the Ordinance in Terms the Prosecution Considers Objectionable.

As construed by the courts below (App. 19, 28-29), the Two-Track System expressly authorizes City prosecutors to depart from the policy of seeking prospective compliance

and to automatically prosecute alleged violators whenever those individuals raise protests to the law that the prosecutors deem "outrageous" or "off-base."[15] The decision to file fast-track criminal charges against appellant without giving him an office hearing and a written warning to "comply or else" was no mere lawless act, but a literal application of a regulatory regime which directs prosecutors to classify violators on the basis of their legal positions and single out for immediate, no-way-out prosecution those and only those individuals who express "adamant attitudes" against the Ordinance. (App. 19.) Such a delegation of censorial power is wholly incompatible with the First and Fourteenth Amendments and is impermissibly calculated to enhance the regulatory artillery of the state with a deadly "silencer" intolerable even in the most heavily regulated open society.

Almost a century ago this Court struck down a grant to San Francisco's Board of Supervisors of the unbridled power to permit exceptions to an ordinance on the ground that the "naked and arbitrary power" thus delegated was "not confided in their discretion in the legal sense of that term, but [was] granted to their mere will." *Yick Wo* v. *Hopkins*, 118 U.S. 356, 366-67 (1886). The delegation was all the more invidious because it was wielded to "divide [those seeking relief from the ordinance] into two classes," the favored and the disfavored, separated by a line drawn at the "mere will and pleasure" of the Board. *Id.* at 368.

The presence of such arbitrary power is even more offensive to the Constitution when reposed in the hands of officials whose duties by their very nature impinge on protected expres-

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[15] Although the Ordinance's words and those of its accompanying written guidelines might have been read more narrowly, the Two-Track System comes to this Court "as authoritatively interpreted" by the actions of the Appellate Department of the Los Angeles Superior Court and the California Supreme Court in this case. *See Cox* v. *Louisiana*, 379 U.S. 536, 545 (1965).

sion. *Lovell* v. *City of Griffin*, 303 U.S. 444, 450-51 (1938) (striking down ordinance requiring a permit from city manager to distribute literature). In the case at hand, the Los Angeles prosecutor held a similar power to divide those who resisted rent control into two classes. The Two-Track System overtly created a bifurcated enforcement regime. The vast majority of alleged offenders were offered a last clear chance to avoid criminal prosecution altogether by complying on demand with the prosecution's construction of the Ordinance. But those who publicly protested the Ordinance or disputed its applicability to their businesses with legal positions the prosecution found "specious" were flatly denied that opportunity. The prosecution retained the power to sort alleged violators into these two categories at whim, since it alone determined which readings of the Ordinance were arguable and which ridiculous; this, in an ordinance conceded to be ambiguous and confusing in many respects even by those who drafted and implemented it. (RTM (1B) 57-59, (2A) 47-48; RT 956-58.)[16]

The appellate court expressly approved of the prosecution's use of protected speech as the basis for disparate prosecutorial treatment and effectively held that the two-track enforcement scheme embodied in the Ordinance was subject to no judicial scrutiny because "it is the discriminate filing of the criminal complaint and not the failure to provide an informal hearing which is the basis for the defense of 'discriminatory enforcement.'" (App. 19.) This position is an unduly restrictive reading of this Court's precedents, which have long been concerned with unequal "administration" of the law, *Yick Wo* v. *Hopkins*, *supra*, 118 U.S. at 369, and invidious selectivity in the "enforcement" of the law. *Oyler* v. *Boles*, 368 U.S. 448, 456

[16] The prosecution itself has a disappointing record in reading the Ordinance correctly; most of its differences of opinion with Wilk were ultimately resolved in appellant's favor. See n.12, *supra*.

(1962). A narrower view of the judiciary's role in ensuring even-handed application of the laws would endorse the use of any explicit criterion for disfavoring protesters within the prosecutorial process so long as the prosecutor was wiley enough to draw that invidious line at some stage of the process — such as the decision to convene an office hearing or send a compliance demand letter — *other than* the initial filing of the complaint. If anything, the appellate court has the concept backwards: the United States has suggested in its brief in *Wayte*, for example, that the government's discretion to decide whom to prosecute is broadest at the front end of the process — in selecting which violators to target. (Brief for the United States at 28-32.) Such deference to the prosecutor's judgment at the identification stage of the process may at least be argued to permit the government to allocate its enforcement resources efficiently. But no such argument is available to those who wish to preserve the prosecutor's power to invoke an unconstitutional ground for disfavoring certain individuals at the interim stages of a beg policy, since those hearing and warning steps are designed precisely to conserve and concentrate the government's resources on compliance, rather than on retribution. *See id.* at 32.

Since the Ordinance is a criminal statute, it is all the more crucial that the procedures and criteria of prosecutors be subject to due process standards, even if they do not literally create the statutory offense at issue. *See United States* v. *Pennsylvania Chemical Corp.*, 411 U.S. 655, 674 (1972). In *Pennsylvania Chemical* this Court held that a business could defend against conviction of a regulatory violation by arguing that it had been misled by the enforcing agency, the Corps of Engineers, into believing that it would not be prosecuted. Although the business knew its acts fell within the statute, it believed that they fell outside the narrow class of violations which the Corps had publicly announced were the only cases it would prosecute.

411 U.S. at 670-75. Wilk's conviction, and the Two-Track System that produced it, are in conflict with the holding in *Pennsylvania Chemical* because the City Attorney's announced, written policy of prosecuting only those who refuse a formal demand to comply led Wilk to believe that he too would receive such a warning prior to the filing of charges, since he believed his reading of the Ordinance to be plausible. Because the definition of what constitutes a "reasonable" reading of the Ordinance is left entirely to the Criminal Branch of the City Attorney's office, the rent control measure as construed below permits "a standardless sweep [that] allows . . . prosecutors to pursue their personal predilections." *Smith* v. *Goguen*, 415 U.S. 566, 575 (1974), quoted in *Kolender* v. *Lawson*, 103 S.Ct. 1855, 1858-59 (1983). As with the statute in *Kolender*, which vested "virtually complete discretion in the hands of the police to determine whether" an individual had produced identification that was "credible and reliable," 103 S.Ct. at 1859, and thus could avoid arrest, so here the Two-Track System vests virtually complete discretion in the prosecution to decide whether an individual has taken a public position on the Ordinance that is "reasonable," and thus can avoid prosecution by acceding to a comply-or-else demand.

Here, as in *Kolender*, the Constitution's concern "is based upon the 'potential for arbitrarily suppressing First Amendment liberties . . ..'" *Id.*, quoting *Shuttlesworth* v. *City of Birmingham*, 382 U.S. 87, 91 (1965). If anything, First Amendment rights are more plainly implicated in this case, since we are dealing not with mere detention, but with invidious criteria for denying a routine opportunity to avoid *prosecution*, and because the imperiled activity — vocal protest about public policy and legislation, even if accompanied by otherwise illegal conduct — is even closer to the core of the First Amendment than was the freedom of movement at issue in *Kolender*. *See*

NAACP v. *Claiborne Hardware Co.*, 458 U.S. 886, 913-15 (1982) (politically motivated boycott prohibited by state antitrust law upheld as protected exercise of right to petition). The decision below, upholding Wilk's conviction and the law under which it was obtained, is therefore in conflict with this Court's holding in *Kolender*.

If the delegation of discretion to the prosecution in this case is circumscribed at all, it is in such a way as to tilt the regulatory scheme against protected speech. For the fast-track, aggravated circumstances exception to the beg policy was construed by the courts below to be properly triggered by nothing beyond vocal protest and controversial readings of the Ordinance. The appellate court expressly ruled that these are legitimate bases for deciding which non-compliers to place into the special category that is automatically prosecuted without warning. (App. 19.) Although a delegation to the prosecution of absolute discretion to warn beforehand or to suspend the beg policy and prosecute would in a sense be more arbitrary, it could not be more inimical to the values of the First Amendment.

Because prosecution under the Rent Moratorium Ordinance and the Two-Track System as construed and applied is based on the content of a non-complier's speech — even if the statute on its face appears neutral — the enforcement scheme is presumptively unconstitutional, *see, e.g.*, *Police Dep't* v. *Mosley*, 408 U.S. 92, 95-96 (1972); *Grosjean* v. *American Press Co.*, 297 U.S. 233, 250 (1936), unless the speech thus singled out is outside the ambit of First Amendment protection. *See Brandenburg* v. *Ohio*, 395 U.S. 444, 448 (1969). That qualification obviously does not obtain in this case. See pp. 25-27 *infra*.

Even if not motivated by a wish to silence or punish dissent, the Two-Track System undeniably has a content-sensitive impact, since only vocal dissenters from governmental views as to the law's scope and meaning are subjected to the exception

to the beg policy which engenders actual prosecution. As such, the Two-Track System must be "demonstrably supported by not only a legitimate state interest, but a compelling one, and [it must] operate without unnecessarily circumscribing protected expression." *Brown* v. *Hartledge*, 456 U.S. 45, 53-54 (1982).

No sufficient state interest exists in this case. No claim is even possible here that the challenged enforcement scheme is justified as a way of focusing only on those violators who "have, by their public statements or otherwise, made clear their actual or intended participation in illegal activity." *United States* v. *Wayte*, 710 F.2d 1385, 1388 (9th Cir. 1983) *cert. granted*, 104 S.Ct. 2655 (1984); *cf. United States* v. *Taylor*, 693 F.2d 919, 923 n.5 (9th Cir. 1982). For, in this case, there is no problem of identifying supposed violators; and any question of lack of knowledge of the law or lack of intent to violate it would obviously have been cured by *giving* notice and an opportunity to comply, *not* by *omitting* those steps. It seems self-evident that the way to determine conclusively which non-compliers are "adamant" enough to prosecute despite a beg policy is to *use* that policy, not jettison it when the non-complier has been a vocal opponent.

In short, whatever authority the government might have to conserve enforcement resources at the expense of free speech by targeting for such "comply-or-else" demands only those whose violations of the regulation are indisputable because self-proclaimed, the First Amendment surely precludes the use of added resources to target for prosecution, *without* any last-chance opportunity to comply, precisely those whose violations are accompanied by vigorous protest or by an expressed viewpoint the government deems "off-the-wall." Bereft of any such compelling or even legitimate interest for support, the Ordinance's pointedly adverse impact on free expression is intolerable.

II. Regardless of the Statutory Authority Under which the Decision to Prosecute Appellant was Made, Wilk's Conviction Cannot Stand Because He was Selected for Surprise Prosecution Without a Compliance Warning on the Basis of His Protected Speech.

There can be no doubt that appellant was shunted away from the City's beg policy and onto the tracks that led straight to criminal prosecution without warning because of his protest against rent control. Both of the courts below found that the decision to prosecute appellant without affording him an informal hearing or, more crucially, a last-chance opportunity to comply was based on the letters he had sent to the City Council. (App. 5-6, 19, 29.) The testimony of the prosecutors who filed the charges confirms the conclusion that it was the "outrageous" "tenor" of Wilk's letters and the "challenge" they represented "to the Ordinance" that convinced the prosecutors not to "shy away from [the] opportunity to confront" Wilk in court. (RTM (1A) 58-59, (1B) 7, 40-41, 64-65, 79-80.) Wilk's case was treated differently because he was "an opponent of rent control" who "was seeking an opportunity to litigate [the Ordinance's] constitutionality." (RTM (1B) 79-80.) The prosecution objected not only to Wilk's opposition to the Ordinance, but also to his reading of it. The legal positions on the Ordinance expressed in good faith by Wilk and his counsel were deemed "specious" (RTM (1A) 31) and "bizarre" (RTM (1B) 43) by the prosecution — despite the fact, as it would later turn out, that most of Wilk's positions were correct. See n.12, *supra*. The Criminal Branch decided on that basis not to bother with giving Wilk an office hearing or a letter of warning. (RTM (1A) 31, (1B) 17-18.) The prosecution was not interested in talking to Wilk to "correct" his "misinterpretation" of the Ordinance, because Wilk's alleged violations were "not the sum

total of the reasons for the filing of a complaint against [him]." (RTM (1B) 27.)

Obviously, no one has an independent constitutional right to be "begged" prior to being prosecuted under a criminal law, or to be prosecuted on a "slow track" that includes an offer of *de facto* amnesty in return for prompt compliance. But the government may not deny anyone, to his prejudice,[17] such a last clear chance to avoid prosecution on the sole basis of what an appellate court (App. 19) correctly holds to be an exercise of a constitutionally protected First Amendment right. *See, e.g., FCC* v. *League of Women Voters,* 104 S.Ct. 3106, 3127-28 (1984); *Regan* v. *Taxation with Representation,* 103 S.Ct. 1997, 2000 (1983); *id.* at 2004 (Blackmun, J., concurring); *Thomas* v. *Review Board,* 450 U.S. 707, 717-18 (1981); *Mt. Healthy City Bd. of Ed.* v. *Doyle,* 429 U.S. 274, 287 (1977); *Perry* v. *Sinderman,* 408 U.S. 593, 597 (1972); *Sherbert* v. *Verner,* 374 U.S. 398, 404-05 (1963); *Speiser* v. *Randall,* 357 U.S. 513, 518 (1958).

It is beyond dispute that freedom of speech and the "right of the people . . . to petition the Government for a redress of grievances," Const., Amend. I, "are among the fundamental personal rights and liberties which are protected by the Fourteenth Amendment from invasion by state action." *Lovell* v. *City of Griffin,* 303 U.S. 444, 450 (1938); *see also NAACP* v. *Claiborne Hardware Co.,* 458 U.S. 886, 911 (1982). "It is also well settled that municipal ordinances adopted under state authority constitute state action and are within the prohibition of the amendment." *Lovell,* 303 U.S. at 450. Appellant

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[17] Denial of the "comply-or-else" warning certainly prejudiced appellant. It is uncontroverted that he would have immediately complied if warned of the criminal charges (RT 851, 880), and that he was in fact relying on the "beg" policy in continuing to collect some disputed rents. (RT 841-43, 845, 848.) It is also undisputed that Wilk fully complied with every count in the original complaint as soon as he learned it had been filed. (RT 849-851; RTM (1B) 41.)

Wilk's letters seeking to organize his tenants and to confront the Los Angeles City Council exemplify a form of expression that is located at the very apex of the First Amendment's priorities. Speech on such public issues as rent control — whether one agrees with or deplores the speaker's views — "has always rested on the highest rung of the hierachy of First Amendment values." *Carey* v. *Brown*, 447 U.S. 455, 467 (1980); *see also Citizens Against Rent Control* v. *Berkeley*, 454 U.S. 290, 295 (1982). Indeed, "speech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison* v. *Louisiana*, 379 U.S. 64, 74-75 (1964).

Appellant's letters constitute a paradigmatic exercise of the right to petition for redress. In *Eastern Railroad Presidents' Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127, 139-40 (1961), this Court held that a publicity campaign conducted by railroad businessmen to secure the adoption of favorable legislation was protected speech, despite "any anticompetitive purpose it may have had." To penalize such petitions by those like Wilk whose livelihood and investments are threatened through new or proposed legislation would be to "deprive the people of their right to petition in the very instances in which that right may be of the most importance to them." *Id.* at 139.[18]

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[18] Unlike *United States* v. *O'Brien*, 391 U.S. 367 (1968), in which the defendant claimed that burning his draft card was itself protected expression, in this case there is no argument that appellant's violations of the Ordinance themselves lay under the mantle of the First Amendment. Yet appellant was indisputably chosen for immediate, no-chance-to-comply prosecution not because of his rent control violations but because of his vehement protests and controversial readings of the Ordinance. Out of 443 cases of non-compliance handled by the City Attorney, this is the only one in which the alleged violator was concededly accorded neither an office hearing to discuss his reading of the law nor an opportunity to comply with the prosecution's reading prior to the instigation of criminal charges. As the government suggests in its brief to this Court in *Wayte* v. *United States*, the term "similarly situated" in the selective prosecution context should include *at least* all those violators of a particular law whose identity is known to the government. (Brief for the United

Finally, adverse treatment by the prosecution on the basis of appellant's willingness to sue the government (App. 7; RTM (1B) 79-80) — surely a form of petitioning for redress of grievances — is equally offensive to the First Amendment. *Dixon* v. *District of Columbia*, 394 F.2d 966, 968 & n.3 (D.C. Cir. 1968).

What happened to Allan Wilk is all the more disturbing because it was not an aberrant occurrence, but an instance of a deeply problematic and constitutionally suspect two-track system of regulatory enforcement.

Conclusion.

The need for ambiguous legislation and administrative flexibility in a highly regulated economy need not entail delegation of the discretion to deny dissenting voices privileges they would otherwise enjoy. Indeed, if the regulatory state is to remain compatible with the rule of law and with a system of ordered liberties, the exigencies of criminal enforcement of economic regulations cannot be allowed to impinge on the rights freely to discuss public issues and to petition the government for redress of grievances — freedoms that constitute the essence of self-government. Yet the decision below sanctioned just such an impermissible burden on the First Amendment by allowing the prosecution to use Wilk's letters to the City Council and his controversial reading of the Rent Moratorium Ordinance as grounds for switching him onto that enforcement track which led inevitably to prosecution without a routine avoidance opportunity.

States at 27). In the case at hand, it is beyond cavil that the appellant was singled out for surprise prosecution from hundreds of other "similarly situated" known non-compliers.

In a Term in which the Court is already considering related issues of the impact of selective enforcement on First Amendment rights, surely this case — which involves what seems to be at least as problematic an enforcement regime in the context of business regulation — is worthy of plenary review. Alternatively, the Court should hold this case on its docket pending resolution of *Wayte* and should then consider vacating the judgment below for reconsideration in light of the Court's opinion in that case.[19]

Respectfully submitted,

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[19] The government has suggested similar treatment of the petition in *United States* v. *Schmucker*, No. 83-2035. See Brief for the United States at 17.

APPENDICES

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Appendix A.

APPELLATE DEPARTMENT OF THE SUPERIOR COURT
STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

Decided February 9, 1984
No. CR A20457

PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,

vs.

PALOS VERDES SHORES MOBILE ESTATES;
ALLAN WILK,
Defendants and Appellants.

Before Bernstein, Reese and Cooperman, Judges.

REESE, Judge

Defendants Palos Verdes Shores Mobile Estates, Ltd. and Allan Wilk appeal from the judgment of conviction of ten counts of violating the Los Angeles rent control ordinance.

Wilk is the sole general partner of Palos Verdes Shores Mobile Estates, Ltd. (PVS). PVS operates a luxury mobilehome park. The following facts are provided by courtesy of the People:

A. *Pretrial Motion to Dismiss Based on People v. Murgia and Alleged Confiscatorily Low Rents*

The first witness presented by the People at the combination *Murgia* motion and motion to dismiss, based upon confiscatorily low return on defendant's investment because of the impact of the rent control moratorium, was Stan Thomas Todd. ("Todd").

Around the middle of 1978, Todd, a deputy city attorney for the City of Los Angeles, became staff assistant to the chief of the Criminal Branch, George Eskin, and had an office next to him in City Hall East. (IA RT 23.) As part of his responsibilities to assure office-wide uniformity with respect to criminal prosecutions, Todd became involved with development of procedures for the review and prosecution of cases alleging violations of the Ordinance. Additionally, he was the only attorney in the office assigned the task of reviewing and filing such cases. Because it was anticipated that there would be a large number of tenant complaints, the Housing Division of the Community Services Department became the agency primarily responsible for handling tenant complaints. (IA RT 25-28.)

A number of options were available to Todd upon review of a complaint. If there appeared to be no prima facie violation of the Ordinance, the complaint would be rejected and sent back to Housing Services. If there were some deficiency in the investigation and it appeared that the deficiency could be remedied, the complaint was sent back to Housing Services for follow-up. (IA RT 28.) If the complaint established a prima facie violation of the Ordinance and Housing Services had done everything it could be expected to do, then either Todd would send the case to the hearing officer in the City Attorney's Office who had been assigned the task of handling all office hearings in these cases, or Todd would take the direct action of filing a criminal complaint. If there were an office hearing, then the hearing officer would send her notes and her recommendation whether to file criminal charges to Todd. The primary purpose of the hearing process was to advise those landlords, unaware of the provisions of the Ordinance, of what their legal obligations were. Once apprised, the landlords were given an opportunity to comply. At the hearings where the landlord refused to comply with the Ordinance after it was fully

explained to him, Todd would review the hearing notes to determine whether the landlord's intransigence was due to a reasonable and good faith position that the landlord was assuming, or whether the landlord was completely "off base" in terms of the interpretation being placed on the Ordinance. If the former, Todd would write a letter to the landlord demanding compliance; if the latter, criminal charges would likely be filed. The overwhelming majority of all cases were resolved by way of the hearing process, and very few demand letters had to be sent. (IA RT 31-33.)

During the period that Todd was in charge of Ordinance prosecutions, three cases were filed without going through the hearing process. One was the case of Mr. Wilk ("Wilk") and Palos Verdes Shores ("PVS"). In all three of these cases, a criminal complaint was filed directly after consulting with the chief in charge of the Criminal Branch, Mr. Eskin. During the period that Todd was reviewing complaints, he filed a total of 13 cases. Each was filed only after their being reviewed by Mr. Eskin. (IA RT 33.)

Each of the three cases filed without a prior office hearing was filed because Todd considered it to be an aggravated case. That is to say, each was a case where it was clear that the landlord knew what maximum rent was allowed under the Ordinance. Since the main purpose of an office hearing was to advise a landlord what the law required, no point would be served by having a hearing for these landlords. (IA RT 34.)

One of the three cases involved a landlord in the San Fernando Valley who was an attorney and who was accepting rolled-back rent from tenants by check, and then additional and unlawful rent by way of cash payments on the side. The second case involved a situation where two landlords had a building in Hollywood. They increased the rent approximately 50% during the time the Ordinance was in effect and called the additional rental increase a "painting fee." (IA RT 35.)

Todd never consulted with any members of the Civil Branch of the City Attorney's Office when deciding whether to file a case. Nor did anybody in the Civil Branch ever urge Todd to file any case. In fact, Todd never had communication of any kind with the Civil side of the office regarding the Ordinance. (IA RT 37-38.)

One of the first documents Todd reviewed concerning PVS was a letter dated August 24, 1978, and marked as People's 1. (IA RT 39.) It was difficult for Todd to believe that anybody could write such a letter. To Todd, it bordered on extortion. "I mean it was telling these people to voluntarily pay an increased rent, and then they wouldn't be subject to six-month increases at $50 at a whack. In other words, 'Don't assert your rights under the moratorium ordinance, and I won't increase your rent. Those of you who do assert your rights, you are going to have your rent increased.'" (IA RT 40.) Shortly after the letter came to Todd's attention, he had the first of many conversations with John Pitchford, the president of the tenants' association at PVS. Pitchford acted as an on-site investigator, informing Todd of Ordinance-related occurrences at PVS. (IA RT 41-42.) During the course of his investigation of PVS, Todd saw many other copies of Exhibit 1, but with different space numbers and different rental amounts filled in. (IA RT 44.)

The second letter that came to Todd's attention was sent by Wilk to a tenant at PVS, was dated September 25, 1978, and was marked People's 2. ("September 25th Letter."). The letter stated that Wilk would continue to note what the established rent was, i.e., an amount that he could not lawfully collect, but the tenant would only be billed for the rolled-back amount. To Todd, this indicated that Wilk was aware of what the lawful rent was, and that he would be prudent and would be only collecting the lawful amount notwithstanding his desire to do otherwise. (IA RT 45-46.) Todd learned from Mr. Pitchford

that the tenants were extremely upset about the situation at PVS and felt they were caught "between a rock and a hard place." They couldn't move their mobile homes into an equivalent park because luxury mobile home parks require that you have a new mobile home when you move in. And the tenants were having trouble selling their mobile homes at PVS because of the expressed intent on the part of Wilk to make substantial rent increases. (IA 46-47).

Though the September 25th letter indicated that Wilk would only be collecting the rolled-back amount, in fact Todd received information that Wilk was collecting the increased rent from five tenants in the park who had moved into PVS after May 31, 1978. (IA RT 47-48.) Sometime after the move-in date and before October 1, 1978, each tenant's rent was increased by $50 per month over the amount each paid upon moving into PVS. (IA RT 51.) Todd learned that all five tenants were retired and living on a fixed income. He identified People's 5B through 5D as communications from these tenants expressing their deep concern as to the legality of the rent increase. (IA RT 55-56.)

Todd explained why he filed this case without setting the matter for an office hearing:

> "Because it was apparent from the tenor of the letters that Mr. Wilk had sent to his tenants, from the information I had received through Mr. Pitchford and direct contacts with the tenants, and the fact that Mr. Wilk was collecting this money from these five tenants and the ordinance may have been unclear on some things, but it certainly was crystal clear on that subject, that he knew exactly what he was doing and that it would be a waste of his time and ours and Kay Cantrell's to have an office hearing in this case. This was — still to this day I consider this the most blatant violation of the ordinance by any landlord in the City." (IA RT 58-59.)

> "It was very apparent to me from reading Mr. Wilk's letters to his tenants, from talking to his tenants, that it would do no good whatsoever to call Mr. Wilk, send Mr. Wilk a letter or whatever else, to get him to change his mind about the rents that he was collecting . . . . The only way to get Mr. Wilk's attention that I could see was to file a criminal complaint against him. And it did. We achieved half our objectives by him turning back the money that he had collected from those five people." (IB RT 40-41.)

Todd was not aware that Claudia McGee-Henry of the Civil Branch of the office may have represented to the court that it was our office policy to set office hearings prior to filing criminal charges. (IB RT 37.)

On December 17, 1978, the Los Angeles City Council passed a clarifying amendment "just so it would be very clear to Mr. Wilk and others who were owners of mobile home parks" that the Ordinance applied to them. Because of the possibility that Wilk may have been operating under the false assumption that the Ordinance did not apply to PVS, Todd dismissed all counts that predated the December amendment. The remaining counts concerned rent collected beginning January, 1979. (IB RT 39.)

George Eskin ("Eskin") was chief of the Criminal Branch at the time Todd filed the criminal charges against PVS. He first became aware of the violations of PVS in September of 1978. At that time, Eskin drafted a memo to then City Attorney Burt Pines, explaining why he felt very concerned about Wilk's letter to the tenants:

> ". . . The tenor of the letter is very disturbing to me. It appeared to me to represent a challenge to the ordinance,

> not in terms of — not only in terms of litigating it, but telling the residents of this mobile home park that it would bear — that they would bear the costs of the litigation and that they were going to be paying $50 a month more in rent, and that they could avoid paying $50 more a month rent if they would participate in the mutual violation of the ordinance. . . ." (IB RT 64-65.)

Eskin concurred with Todd in the decision to file against Wilk without a prior office hearing. (IB RT 71-72.) "I don't believe that [an office hearing] would have resulted in compliance." (IB RT 75-76.) The fact that Wilk was an opponent of rent control had no bearing on the decision to file a criminal complaint. (IB RT 79.) "I had the sense that this man [Wilk] knew what was in the ordinance, knew its requirements and was not going to comply, but rather was seeking an opportunity to litigate its constitutionality." (IB RT 79-80.) Eskin was unaware that at the time criminal charges were filed, there was a pending civil suit filed by Wilk against the City. Had he known, it would not have affected his decision to file the case. (IB RT 71-72.)

Timothy Tierney ("Tierney") is an attorney who represented Wilk and PVS during the civil suits attacking the constitutionality of the Ordinance. The majority of Tierney's testimony concerned a purported agreement or stipulation entered into between himself and Claudia McGee-Henry, the deputy city attorney representing the City in the civil suits. The agreement was apparently made during the unreported hearing on Wilk's application for a TRO against enforcement of the Ordinance. According to Tierney, the judge denied the TRO based upon Ms. McGee-Henry's representation that it was normal City Attorney policy to have an office hearing prior to filing a criminal complaint. (IIA RT 13-14.)

The hearing on the preliminary injunction was held on November 22, 1978. A transcript of that hearing was introduced into evidence as Exhibit L.

Tierney was questioned concerning a statement made by the deputy city attorney at the hearing on the preliminary injunction, appearing at page 7 of Exhibit L: "At the present time there is a stipulation in effect saying that the City of Los Angeles will not take any action against the plaintiff for any rent increases received by him *prior to the hearing on this date*." Tierney remembered this statement and conceded that there was no formal stipulation or agreement in effect. (IIA RT 15, 31-32.) He understood that at most Wilk was protected from criminal prosecution *only* for conduct occurring "prior to the hearing on [November 22, 1978]."

> "We had talked in part of our lawsuit that the ordinance at that time did not cover mobile home communities, and she had stated to me that they would not bring action or could not bring action on that — *for that time period*. So I guess that's her stipulation, if she wants to classify it as that, stipulation or admission. I don't know how to call it." (Emphasis added.) (IIA RT 15:21-28.)

Tierney admitted fully discussing the provisions of the Ordinance with Wilk both prior to and subsequent to the clarifying amendment. When appearing at the hearing on the preliminary injunction on November 22, 1978, Tierney was aware of the clarifying amendment and that mobile home parks were clearly covered by the Ordinance. (IIA RT 25-28.)

Tierney expressed some reservations regarding Wilk's August 24th letter to the tenants. Aware that collecting the $50 rent increase would be a violation of the Ordinance, Tierney was concerned that some tenants might pay the extra amount, subjecting Wilk to criminal prosecution. (IIA RT 29-30.)

Claudia McGee-Henry ("McGee-Henry") was involved in drafting the Ordinance and was employed as a deputy city attorney in the Civil Branch of the City Attorney's Office. At no time did she tender any input or suggestions to any member of the Criminal Branch concerning criminal prosecutions under the Ordinance. (IIA RT 48.) At the hearing on the TRO, the judge was interested to see if she and Tierney could "work some type of stipulation about those tenants who might want to voluntarily pay the PVS — Palos Verdes Shores the rent which Palos Verdes Shores think they might be entitled to." (IIA RT 50:24-27.) However, nothing firm was resolved and no stipulation was ever agreed to. (IIA RT 50-51.) At the hearing on the TRO, McGee-Henry explained to Tierney that usual office policy in Ordinance cases was to have an office hearing prior to institution of criminal charges. (IIA RT 52, 57-58.) When asked concerning her "stipulation statement" made at the November 22, 1978, hearing on the preliminary injunction, McGee-Henry stated:

> "There was no written stipulation in effect. All I think I was saying was that prior to the hearing no one was going to haul Mr. Wilk over into the criminal courts.
> Q: When you say 'prior to this hearing' what hearing did you mean?
> A: November 22. No one was going to trot him over to the criminal courts.
> Q: And what was your understanding that that stipulation referred to? What sort of behavior of Mr. Wilk?
> A: The only issue that we had ever discussed in terms of a stipulation was this question of those tenants who voluntarily wanted to, out of their own sense of fairness, pay Mr. Wilk the money he thought that he was entitled to. And I think Mr. Tierney's statement following my comment makes it clear that that was the only area that we had even discussed in terms of the stipulation.

Q: And you are referring to Mr. Tierney's statement at page 8, line 10, 'On the stipulation that Ms. Henry mentions, the plan to accept increases in rent voluntarily given to him by the residents, gives him the right to come in and collect those rents.' Is that the statement you are referring to?
A: That is correct. That's right." (IIA RT 59:7-60:11.)

In chambers at the hearing on the TRO, the judge was concerned with whether Wilk would be criminally prosecuted before the 20th, which was the date originally set for the hearing on the preliminary injunction. After McGee-Henry indicated to the court that it was the usual procedure of the City Attorney's Office to hold a hearing, the court denied the TRO. (IIA RT 70.)

Prior to the filing of the criminal action in February of 1979, McGee-Henry had not been notified that Wilk was under investigation by the Criminal Branch of the office, nor did she ever call anybody in the Criminal Branch to notify them concerning any possible stipulation that had been entered into. In particular, she never spoke to Tom Todd, nor to George Eskin. Asked why she had not spoken to those persons, she indicated that as far as she knew all the rents at PVS had been rolled back and the park operators were proceeding in compliance with the law. She assumed that they would have increased the rents only if they had gotten the preliminary injunction, but not otherwise. She had received no indication from Tierney nor from any tenants at the park that PVS was proceeding other than in full compliance with the law. (IIA 60-61, 67-68.)

Though she was in attendance during some of the public hearings held in City Council concerning the Ordinance, at no time did she ever recall Wilk attending any of these hearings, nor did she recall anybody attending who stated that he was a representative of Wilk. (IIA RT 66.)

B. *Hearing on the Issue of Confiscation*

Peter Mlynaryk ("Mlynaryk"), a professor of finance at California State University, Fullerton, testified on behalf of the defense. An economics consultant to the firm of Harold Davidson and Associates, he performed an economics study for PVS. (IIA RT 84-85.) In February and March of 1980, the firm was requested to do a study to determine the market rates of return for investors in mobile home parks, and to determine the reasonable useful economic lives of improvements at mobile home parks. (IIA RT 85.) It was his opinion that a reasonable rate of return should be 18% at PVS. (IIA RT 94.) This rate of return was based upon economic conditions for the period 1978 through 1980. (IIA RT 95.) For the period October 1978 through April 1979, he stated that the rate of return should be approximately 14 to 16%. (IIB RT 5.) Mlynaryk was not a certified public accountant, and his total background in accounting consisted of approximately 9 to 12 units of college accounting classes. (IIB RT 6.) The "economic study" conducted consisted primarily of telephone interviews of other mobile home park operators and owners. Each was asked the rate of return for the period 1975 through 1979. (IIB RT 10.) Mlynaryk was relying upon the statements of the persons he spoke to over the phone, since he never visited any of the parks to confirm any of the representations made to him. (IIB RT 10-21.)

Mlynaryk admitted that he had no expertise in the area of income tax or any other type of tax law. (IIB RT 22.) In fact, he referred persons requesting such information to their own tax advisor for the tax implications of investments. Prior to coming to his conclusion as to the appropriate rate of return for PVS, he never looked at any of the accounting ledgers of the partnership, nor did he interview any of the partners or any persons involved as investors in PVS. (IIB RT 25-26.)

Mlynaryk was unaware when performing his economic analysis that there was a long-term lease on PVS which ran until March 20th of 2067. (IIB RT 29.) He admitted that he had never dealt with the economic effect of a long-term lease when performing a mobile home park financial analysis. (IIB RT 31.)

Herbert Laskin ("Laskin") was called as an expert for the People. He is a certified public accountant licensed by the State of California, an attorney at law licensed in the State of California, and a real estate broker licensed in the State of California. He had worked in all three of these areas for 20 years. He had extensive experience in the area of accounting, including having worked for the Internal Revenue Service for two years. (IIB RT 64-66.) As part of his normal business, over the years he had advised numerous clients concerning real estate investments; presently he had a client who was developing a mobile trailer park. He was working with this developer, reviewing the financial information for inclusion in the prospectus concerning a public offering for that trailer park. (IIB RT 67.)

Based upon his expert opinion as to generally accepted accounting principles, and from his review of the financial books of PVS and depositions of both Wilk and his accountant, Ms. Kronenberger, PVS overstated its expenses. (IIB RT 68-69.) Laskin discussed a document that he prepared and which was marked as People's 10. This document reflects PVS expenses adjusted to conform to generally accepted accounting principles. Among those expenses that were improperly taken were the following: (1) debt service; (2) finder's fee; (3) management fee paid in 1978; (4) extraordinary legal fees paid to fight rent control; and (5) certain expenses for the recreation hall. (IIB RT 71-74, IIIA RT 4-17.) Using the corrected figures, Laskin calculated the return to PVS in the years 1977, 1978, and 1979. Before the payment of the debt service in their loans, the returns were as follows: 9.1% in 1977; 11.7% in 1978; and

12.9% in 1979. (IIIA RT 18.) After the payment of debt service, the returns were as follows: 8.1% in 1977; 15.7% in 1978; and 18.9% in 1979. (IIIA RT 18-25.) Referring to People's Exhibit 15, a projection of the increased annual income starting with the adjusted 1978 figures, Laskin concluded that as a result of rent control PVS would prosper and would do as well with rent control as Wilk originally had projected in the three-page prospectus that he gave to the original investors of PVS. (IIIA RT 26-35.)

Laskin reviewed this prospectus and concluded that Wilk only expected rents to increase at approximately 8% a year. (IIIA RT 39.) Laskin also noted that Wilk did not put any money into the investment, and that one of the significant economic advantages to the partnership was the decrease in property taxes due to the passage of Proposition 13. In 1977-78, the property taxes on PVS were $95,500; in 78-79, they dropped to $35,500. (IIIA RT 45-47.) Among other of the economic advantages that the partnership had were a number of low interest loans that were assumed by the partnership at the time the property was acquired. (IIIA RT 58.)

Brad Ptolemy was called as a defense witness and testified that he was a certified public accountant working for the firm of Coopers and Lybrand. Asked whether the tax returns prepared by his firm for PVS for the years 1977, 1978, and 1979 were prepared in accordance with generally accepted *accounting* principles, he would only say that "the tax provisions . . . are very similar to the generally accepted accounting principles . . . ." (IIIA RT 96:11-17.)

In denying the confiscation portion of the motion to dismiss, the court placed total reliance on Laskin's testimony and his conclusion that there was a 9.1% profit in 1977, 11.7% profit in 1978, and 12.9% profit in 1979. The court concluded by stating, "I do not feel that in light of that, in light of the testimony of Mr. Laskin, that this is in any way confiscatory.

As I say, there are tax situations, tax write-offs, and this is a big part of it." (IIIB RT 75-76:16-19.) In addition, the court found that though the rent moratorium ordinance resulted in a loss of rents amounting to $70,000, that was offset by the $60,000 savings resulting from passage of Proposition 13. (IIIB RT 76-77.)

In denying the *Murgia* portion of the motion to dismiss, the court found that defendants failed to make a prima facie showing to invoke application of *Murgia*. The court found that Todd acted properly based upon the evidence in front of him, that evidence being the blatant circumstances surrounding Wilk's aggressive posture towards his tenants. In addition, the court found that there was no specific promise made by McGee-Henry, especially since she was in the Civil Branch of the office and had nothing to do with filing complaints in the Criminal Branch of the City Attorney's Office. The court concluded:

> "I don't think you've met the first prong. The *Murgia* test established they were singled out for prosecution, or where others similarly situated were not. Nor have you presented the evidence that this was done because of any invidious or discriminatory purpose." (IIIB RT 78-79.)

C. *Trial Testimony and Evidence*

Evidence supporting the guilty verdict on Counts 1 through 10 consisted of the testimony of five tenants at PVS and supporting exhibits.

Clementine Gouger ("Gouger") moved into PVS on July 1, 1978, into a mobile home that was already on the site. (IV RT 93.) When she moved in, she paid $330.63 for the first month's rent and the same amount for her last month's rent.

(IV RT 96.) Gouger explained that she received a letter dated August 24th (People's 1-D) from PVS. Based upon this letter, Gouger found out that her rent was going to be increased by $50 beginning November 1, 1978. (IV RT 108, 112-113.) Gouger also received a letter in September from PVS, identified as People's 1-E. Notwithstanding the letter, she still felt that she had to pay the increased rent for the month of November. (IV RT 114.) She paid the $50 additional rent for the month of November, and then wrote a letter to Wilk complaining about the rent increase. (IV RT 115, 119.) She received a response to her letter of complaint, signed by the resident manager of PVS, Harold Hohlman. This letter from Mr. Hohlman indicated to Gouger that she in fact had to continue to pay the $50 increase. She continued to pay the rent increase for the months of January and February of 1979. (IV RT 122-129.)

Vito Siskos ("Siskos") purchased a mobile home and moved into PVS on August 26, 1978. He as well received the August 24th and September 25th letters from PVS concerning the rent increases noticed to begin on November 1, 1978. He did not feel that the September 25th letter freed him of the obligation of paying the increase, and so he continued to pay the increased rent for the months of January and February of 1979. (IV RT 134-135.) In response to a letter of complaint Siskos sent to PVS, he received a letter from Mr. Hohlman explaining the position of PVS, People's 2-F. (IV RT 142-143.)

Lawrence Paulson moved into PVS in the last week of June 1978, having bought the mobile home from a person who had been living there. He as well received the letters of August 24th and September 25th, and believed that he had the continued obligation to pay the rent increase beginning on November 1, 1978. He did so through the months of January and February 1979. (IV RT 159-175.)

Gayla Meyer moved into Palos Verdes Shores in mid-September of 1978, having purchased her mobile home from the previous owner. She received the August 24th and September 25th letters from PVS, continued to pay the increased rent that was requested, wrote a letter protesting the rent increase, and received Mr. Hohlman's explanation for the rent increase, People's 4-H. (IV RT 182-212.)

Robert Schlechter moved into PVS in September of 1978, having bought the mobile home from the previous owner. He received the August 24th and September 25th letters from PVS informing him of the rent increase. He paid the $50 increase through the month of February 1979, and after writing a letter of protest to PVS, received Hohlman's letter of explanation, people's 5-H.

D. *Midtrial Hearing on Estoppel Defense*

In considering whether to allow testimony on a defense claim that the prosecution should be estopped from prosecuting the case, the court heard testimony from Tierney, and considered in addition all of the other testimony and evidence presented at the pretrial motions to dismiss. (VI RT 667.)

Tierney was called as a defense witness and explained that he had been retained by Wilk to file a lawsuit questioning whether the rent control ordinance was intended to apply to mobile home parks. (VI RT 669-670.) As part of the lawsuit filed, Wilk, a practicing attorney, sought a temporary restraining order against the City of Los Angeles to stop them from enforcing the ordinance against the park until such time as it was determined that a mobile home park was covered under the terms of the ordinance. (VI RT 701.) According to Tierney, it was Wilk's intent to comply with the law pending the determination of his declaratory relief action. (VI RT 714-715.) Tierney conceded that there was never a written stipulation that

said Wilk could voluntarily collect a $50 increase from the tenants who wanted to give it to him. (VI RT 720.)

Tierney identified a letter, People's 21-A, written on October 19, 1978, signed by himself, and addressed to McGee-Henry. (VI RT 721-722.) In part, this letter provided: "This will confirm our prior oral understanding that we will not enter into nor file the stipulation which we discussed," followed by, "and my client will not accept rents in excess of the rent ceilings permitted under Ordinance No. 151.415." Tierney admitted writing this letter. (VI RT 722.) He made a number of other admissions: McGee-Henry never spoke to Wilk nor did she ever say to him that he could collect the $50 rental increases from anyone at PVS (VI RT 730); and no one from the City Attorney's Office ever told Tierney that it was not against the law to raise the rent for tenants who moved in after May 31, 1978. (VI RT 731.)

The court considered all the testimony presented at the pretrial motions. (VI RT 735-736.) In applying Evidence Code section 352 and in ruling that the estoppel defense and instruction should not go to the jury, the court made the factual finding that at the hearing on the preliminary injunction, Tierney was not misled into believing that criminal prosecution would not proceed for conduct occurring subsequent to the date of the preliminary injunction hearing. In making this finding, the court reviewed Exhibit L, the transcript of the hearing on the preliminary injunction, and stated: "'The City will not take any action for any rent increase received prior to the hearing on this date.' That seems to me to offer his [Wilk] enough protection where a preliminary injunction is not needed." (VI RT 741.) The court concluded that Tierney's letter, Exhibit 21-A, confirmed that there was no stipulation or agreement affecting filing of the 1979 charges. "So I don't see that there is a promise of a hearing." (VI RT 746.) The court concluded:

> "I'll make a finding that it was not shown that Claudia Henry was apprised of all the facts, that it was not shown that the other party was ignorant of the true state of facts, that — or that Wilk relied on this conduct to his injury. He was pressing and certainly has had his measure of due process if anybody has had with proceedings and top counsel. As many as three or four counsel have been here and they have been proceeding and handling this diligently all along. So, therefore, under 352 I'm not going to allow this to go to the jury." (VI RT 747.)

Defendants first contend on appeal that the trial court erred in not finding that the ordinance was discriminatorily enforced against them because of Wilk's outspoken opposition to the ordinance. Defendants argue that they should have been given an opportunity to comply with the ordinance before charges were brought as this was the policy of the city. We find no error. This court must review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence — that is, evidence which is reasonable, credible and of solid value — such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. *People* v. *Johnson* (1990) 26 Cal.3d 557, 562. Our examination of the record convinces us that substantial evidence supports the trial court's rejection of defendants' claim of discriminatory enforcement.

Defendants failed to meet the two-prong test for establishing a prima facie case for discriminatory enforcement. This test was set out in *People* v. *Milano* (1979) 89 Cal.App.3d 153, where the court stated:

> Essential to a defense of discriminatory prosecution is the establishment by the defendant that he was engaged in

> protected activity, which activity resulted in his arrest. In *United States* v. *Berrios* (2d Cir. 1974) 501 F.2d 1207, 1211, the court explained: "To support a defense of selective or discriminatory prosecution, a defendant bears the heavy burden of establishing, at least *prima facie,* (1) that, while others similarly situated have not generally been proceeded against because of conduct of the type forming the basis of the charge against him, he has been singled out for prosecution, and (2) that the government's discriminatory selection of him for prosecution has been invidious or in bad faith, i.e., based upon such impermissible considerations as race, religion, or the desire to prevent his exercise of constitutional rights. These two essential elements are sometimes referred to as "intentional and purposeful discrimination.' [Citations.]"

(P.p. 164-165; also, see *Murgia* v. *Municipal Court* (1975) 15 Cal.3d 286, 298-300.) Defendants were not similarly situated to other violators of the ordinance. An informal hearing provided prior to the filing of the complaint would have served the purpose of letting a violator know that his acts were illegal and encouraging a violator to comply with the law. Wilk's adament defiance of the ordinance placed him in a category of violators who would be the least responsive to the purpose of an informal hearing. It is true that Wilk in being outspoken against the ordinance was exercising his First Amendment rights, but his adament attitude also was a legitimate basis for not providing defendants with an informal hearing. Furthermore, it is the discriminate filing of the criminal complaint and not the failure to provide an informal hearing which is the basis for the defense of "discriminatory enforcement." No discrimination was shown in the filing of the criminal charges in the instant case.

Defendants next contend that the trial court erred in excluding evidence of and a jury instruction of the defense of "estoppel." Defendants argue that the city was estopped in prosecuting them based on assurances made by the city attorney in defendants' civil action not to prosecute. The trial court properly excluded defendants' proffered evidence of estoppel under Evidence Code section 352 which states:

> **§ 352. Discretion of court to exclude evidence**
> The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.

Defendants' proffered evidence of estoppel lacked probative value as defendants failed to meet the test of estoppel as set out in *Driscoll* v. *City of Los Angeles* (1967) 67 Cal.2d 297. The court in *Driscoll* stated:

> Generally speaking, four elements must be present in order to apply the doctrine of equitable estoppel: (1) the party to be estopped must be apprised of the facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel had a right to believe it was so intended; (3) the other party must be ignorant of the true state of facts; and (4) he must rely upon the conduct to his injury. (*California Cigarette Concessions, Inc.* v. *City of Los Angeles* (1960) 53 Cal.2d 865, 869-870 [3 Cal.Rptr. 675, 350 P.2d 715]; *Lusitanian-American Dev. Co.* v. *Seaboard Dairy Credit Corp.* (1934) 1 Cal.2d 121, 128 [34 P.2d 139]; *Safway Steel*

Products, Inc. v. *Lefever* (1953) 117 Cal.App.2d 489, 491 [256 P.2d 32]; *Transport Clearings-Bay Area* v. *Simmonds* (1964) 226 Cal.App.2d 405, 427 [38 Cal. Rptr. 116].)

(P. 305.)

Defendants failed to establish that the city affirmatively misled defendants into believing that their conduct would not be subject to prosecution. Defendants were convicted only for violations occurring after the ordinance was amended to clarify that it applied to mobile home sites. The reporter's transcript for the preliminary injunction hearing reveals that the city attorney promised to not take any action for those rent increases received *prior* to the preliminary injunction hearing. There was no proffered evidence of any agreement not to prosecute for subsequent illegal conduct. The city attorney's policy of encouraging voluntary compliance also did not amount to estoppel. To accept defendants' argument that they relied on the "voluntary compliance" policy of the city attorney to continue to violate the ordinance would mean that the policy amounted to a license to flagrantly violate the law with impunity. We reject such an argument as this was not the intent of the policy and defendants could not have reasonably so believed.

Defendants next contend that the conviction is not supported by substantial evidence because there was no evidence of the status on May 31, 1978 of the defendants' subject rental units which was necessary in order to determine the applicable maximum lawful rent. We disagree. Section 3, subdivision (B) (1), (2), (3), (4) states:

> (1) For a rental unit which was rented as of May 31, 1978, and continued to be rented thereafter to one or more of the same persons: the rent shall not exceed that in effect on May 31, 1978.

(2) For a rental unit which was not rented as of May 31, 1978, but was subsequently rented and continued to be rented to one or more of the same persons: the rent shall not exceed that in effect on the date the rental unit was re-rented, after May 31, 1978, so long as such unit continues to be rented to one or more of the same persons.

(3) For a rental unit voluntarily vacated on or after June 1, 1978, and prior to the end of the moratorium: if the vacancy was voluntary (i.e., not the result of an eviction, whether for just cause or otherwise or of landlord refusal to renew a periodic tenancy or lease agreement), then the rent may be increased upon the re-rental of the rental unit. So long as the rental unit continues to be rented to one or more of the same persons, such rents shall not exceed that in effect on the date the rental unit is re-rented

. . . .

(4) For rental units vacated other than voluntarily after May 31, 1978: the rent for such rental units shall not thereafter exceed the rent in effect immediately prior to such involuntary vacation, unless the unit is subsequently voluntarily vacated."

As to four of the five victim tenants there was substantial evidence that their units had been voluntarily vacated after June 1, 1978 before the victims moved in. Thus, the maximum rent was the amount first paid by the victim. This evidence consisted of letters sent by defendants to the victims stating that section 3, subdivision (B)(3) of the ordinance was applicable. As to the fifth victim the status of the unit did not fall under subdivision (B)(1) as the victim was not the same person who rented the unit on May 31, 1978. The People did not need to establish whether the unit came under subdivision (B)(2) or (3) because the maximum rent in both cases was the same

which was the amount paid when the victim rented the unit. If defendants had information that the amount of the rent fell under subdivision (B)(4) then it was the defendants' burden under the rule of convenience to prove those facts which would bring them under the rental amount set forth in that subdivision. This rule was set out in *People v. Yoshimura* (1979) 91 Cal.App.3d 609:

> The court's action was predicated on the so-called "rule of convenience." (*People* v. *Osaki* (1930) 209 Cal. 169, 176-193 [286 P.1025]; *People* v. *Flores* (1976) 62 Cal.App.3d Supp. 19, 22-23 [133 Cal.Rptr. 759]), or "rule of necessity and convenience." (*People* v. *Montalvo* (1971) 4 Cal.3d 328, 334 [93 Cal.Rptr. 581, 482 P.2d 205, 49 A.L.R.3d 518].) The rule has emerged from a long line of decisions which operate to impose on a defendant the burden of proving an exonerating fact if its existence is "peculiarly" within his personal knowledge and proof of its *non*existence, by the prosecution, would be relatively difficult or inconvenient. (*People* v. *Boo Doo Hong* (1898) 122 Cal. 606, 608-609 [55 P. 402] [license to practice medicine]; *People v. Fortch* (1910) 13 Cal.App. 770, 775 [110 P. 823] [license to practice dentistry]; *People* v. *Osaki, supra,* at p. 182 [citizenship by birth]; *People* v. *Marschalk* (1962) 206 Cal.App.2d 346, 349-350 [23 Cal.Rptr. 743] [prescription authorizing possession of narcotics]; *People* v. *Flores, supra,* at pp. 21-23 [license to do business as a carrier].)

(P.p. 626-627.) The facts of whether defendants evicted or refused to renew the rental agreement of the prior tenant of the unit are facts within the defendants' knowledge and it would

be relatively difficult or inconvenient for the People to prove the non-existence of these facts.

Defendants next contend that since they had filed a civil suit challenging the validity of the ordinance that they should be immunized from being criminally prosecuted under the ordinance. This argument is based upon a constitutional tolling rule first set out in *Ex parte Young* (1980) 209 U.S. 123. The court in *Brown & Williamson Tobacco Corp. v. Engman* (1975) 527 F.2d 1115, discussed this rule and stated:

> Appellants principally argue that they are entitled to a stay of the accrual of civil penalties as a matter of law. They do so on the basis of a series of Supreme Court decisions which commenced with *Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908), and include *Wadley Southern Railway Co.* v. *Georgia*, 235 U.S. 651, 35 S.Ct. 214, 59 L.Ed. 405 (1915); *Oklahoma Operating Co.* v. *Love*, 252 U.S. 331, 40 S.Ct. 338, 64 L.Ed. 596 (1920), and *St. Regis Paper Co.* v. *United States*, 368 U.S. 208, 82 S.Ct. 289, 7 L.Ed.2d 240 (1961).[6] The argument is that a party whose conduct is made subject to administrative action must be given the opportunity to obtain a judicial test of the validity of such action and, further, as a matter of due process of law, cannot be subjected to the risk that substantial penalties will accumulate during the course of the judicial proceeding. This line of cases is based on the reasoning that, regardless of the ultimate determination on the merits, due process requires that some real opportunity to challenge administrative action be afforded, and that such opportunity cannot exist where penalties are so great that noncompliance and a judicial challenge cannot be risked.

(P.p. 1118-1119.) Thus, this rule has only been applicable to challenges to administrative actions. We decline to extend this

rule to toll criminal proceedings. It is recognized in California that a defendant may through an injunction or declaratory relief action seek to have equity enjoin the criminal prosecution. (*Abbott v. City of Los Angeles* (1960) 53 Cal.2d 674, 678, fn.2.) The city attorney's assurances in the defendants' civil action in the instant case to not prosecute for defendants' illegal conduct prior to the filing of the civil action did not deprive defendants of their right to seek equitable relief. Under the same reasoning we do not find that the penalties set out in the ordinance are invalid under the rule set out in *Ex parte Young, supra,* requiring an opportunity prior to administrative action to challenge the penalties.

Defendants next contend that the ordinance is impermissibly vague as to what conduct was illegal. Defendants were convicted for violation of section 3 of the ordinance. This section is not unconstitutionally vague. The standard of determining whether a statute is unconstitutionally vague was set forth by this court in *People v. Smith* (1955) 133 Cal.App.2d Supp. 777, 781:

> All presumptions and intendments favor the validity of a statute and mere doubt does not afford sufficient reason for a judicial declaration of invalidity. Statutes must be upheld unless their unconstitutionality clearly, positively and unmistakably appears. (*Collins* v. *Riley,* 24 Cal.2d 912, 915 [152 P.2d 169]; *People* v. *Superior Court,* 10 Cal.2d 288, 298 [73 P.2d 1221]. See also *Jersey Maid Milk Products Co.* v. *Brock,* 13 Cal.2d 620, 636 [91 P.2d 577], and cases cited.)
>
> "A statute should be sufficiently certain so that a person may know what is prohibited thereby and what may be done without violating its provisions, but it cannot be held void for uncertainty if any reasonable and practical construction can be given to its language. As stated in

Pacific Coast Dairy v. *Police Court*, 214 Cal. 668, at page 676 [8 P.2d 140, 80 A.L.R. 1217], 'Mere difficulty in ascertaining its meaning, or the fact that it is susceptible of different interpretations will not render it nugatory. Doubts as to its construction will not justify us in disregarding it.'" In *Smith* v. *Peterson* (1955). 131 Cal.App.2d 241, 246 [280 P.2d 522], the court expressed like views, and added: "The requirement of reasonable certainty does not preclude the use of ordinary terms to express ideas which find adequate interpretation in common usage and understanding." In *Smulson* v. *Board of Dental Examiners* (1941), 47 Cal.App.2d 584, 587 [118 P.2d 483], the court said: "It is not required that even a penal statute, to be valid, have that degree of exactness which inheres in a mathematical theorem." In *People* v. *Smith* (1939), 36 Cal. App.2d Supp. 748, 752 [92 P.2d 1039], this court said: "To make a statute sufficiently certain to comply with constitutional requirements it is not necessary that it furnish detailed plans and specifications of the acts or conduct prohibited." In *People* v. *Ring* (1937), 26 Cal. App.2d Supp. 768, 772 [70 P.2d 281], this court said: "Words used in creating a statutory crime do not fail of such certainty merely because the offense, when viewed through them, may not have all the precision in outline of a geometrical figure; if the main and central part of the field of view is clear, some slight lack of definition around its outer edges is not fatal."

The language in section 3 is sufficiently concise to inform defendants of what conduct would be illegal under the ordinance.

Defendants' final contention is that the ordinance was confiscatory as applied to them. We reject defendants' argument

as there was substantial evidence that the ordinance was not confiscatory as applied to defendants. The testimony of Laskin and supporting documents established that before, during, and after the ordinance the profits of PVS increased; PVS's cash flow remained positive during the moratorium period; and the net operating income of PVS as a percentage of the investment was 9.1% in 1977, 11.7% in 1978, and 12.9% in 1979. Thus, defendants were able to obtain a "just and reasonable return of their property" which precludes a finding that the ordinance was confiscatory. (*Birkenfeld v. City of Berkley* (1976) 17 Cal.3d 129, 165.) Defendants attack Laskin's expert testimony on the basis that he ignored generally accepted accounting principles and he improperly excluded from his financial analysis certain expense items. Our function on review is not to reweigh the evidence. (See *People v. Johnson* (1980) 26 Cal.3d 557, 562.) If we were to re-evaluate the accuracy of Laskin's expert opinion we would be re-weighing the evidence contrary to our appellate function.

The judgment of conviction is affirmed.

Appendix B.

IN THE MUNICIPAL COURT OF LOS ANGELES JUDICIAL DISTRICT, COUNTY OF LOS ANGELES, STATE OF CALIFORNIA

HON. Malcolm H. Mackey, Judge

THE PEOPLE OF THE STATE OF CALIFORNIA
Plaintiff,
vs.
PALOS VERDES SHORES MOBILE ESTATES, Ltd., ALLAN WILK
Defendants.

App. 28.

No. 31118020

REPORTER'S TRANSCRIPT OF PRE-TRIAL MOTION
TO DISMISS
June 24, 1982

[RTM (3B) 77-79]

I think I have covered all the issues but *Murguia*. The *Murguia* case is an interesting case. It comes up more and more in criminal cases. I see it all the time. It is very popular, invidious discrimination.

To quote Justice Richardson — what did he say — who concurred in the decision? He said, well — expressed reservations about such a defense of discriminatory prosecution, but agreed with the majority, the availability to a limited number of purposes described in the opinion, and this was a labor situation, that would not otherwise have been prosecuted for discriminatory conduct. A serious offense in the vast majority of offenders would find it extremely difficult to make such a showing. That is what he said. And this has been my observation in seeing a number of situations in *Griffin vs. Municipal Court* — and it mainly comes up in race relations — one deputy was black and there was black and there was an allegation that if he were white he wouldn't have been charged with the offenses. And this was only at the discovery proceeding, along with *Murguia* was discovery. And we use it a lot in discovery in these cases. That was allowed as a defense.

I don't know what ultimately the rulings in those cases were, but they were allowed as a defense, and you have raised this as a defense. But they are difficult. I do not find that you have made a prima facie showing to invoke *Murguia*. True, there was a policy of the City Attorney to give notice of hearing. But there was an exception, if you look at the rules and you

apply the rules in extraordinary circumstances. Mr. Todd said in blatant circumstances, and he felt this a blatant case, actually the letter is a little bit heavy; the first letter by Mr. Wilk. He is excited about rent control and there is no question he is against rent control. But there is nothing to show that he was singled out as a person.

There were two or three other problems. Todd felt in seeing the letter, that he would file. He had the authority to do so. I don't think, and we are talking about estoppel on the part of Claudia Henry, she was in the civil and I don't know what her authority was. She certainly wasn't the prosecuting attorney in the City Attorney's Office. I do not find that she made a specific promise. There was some indication that there should be a hearing or maybe there would be a hearing. Certain charges were dismissed that came in that area of — There was a question of whether this applied to mobile home parks.

These charges were dismissed. There were amendments into the golf course counts. Now, whether the People can sustain this at the time of trial based upon the beyond a reasonable doubt, is something else that I am not concerned about at this time. But I do not find that *Murguia* applies.

I don't think you have met the first prong. The Murguia test established they were singled out for a prosecution, or where others similarly situated were not. Nor have you presented the evidence that this was done because of any invidious or discriminatory purpose. I think the same thing, the people in the AbScam and New York Vice Squad, and this is one of the things that police officers who are prosecuted today are bringing up Murguia, saying that every one, other officers are doing it and why aren't they prosecuted? Therefore, I am singled out. And AbScam. Congressmen claim that they were — Senators claim that they were singled out, and other people were in a situation. But I don't find it — perhaps maybe those situations may differ in the facts. But in looking at the facts

of this case, I do not find it. Therefore, all your motions Counsel, to dismiss are denied.

[Irrelevant portions omitted.]

Appendix C.

COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT

Duplicate Notice Los Angeles, Cal. May 9, 1984

TITLE: Palos Verdes Shores
vs.
Appellate Dept. S.C.L.A. No. B004909

THE COURT:

PETITION FOR WRIT OF CERTIORARI/
MANDATE DENIED

Clay Robbins, Clerk

APPENDIX D.

CLERK'S OFFICE, SUPREME COURT
4250 State Building
San Francisco, California 94102
JUN 21, 1984
I have this day filed Order

App. 31.

HEARING DENIED.

In re: 2 Civ. No. B004909

PALOS VERDES SHORES MOBILE ESTATES, Ltd.
vs.
Superior Ct. L.A. (PEOPLE)

Respectfully,

Clerk

Appendix E.

APPELLATE DEPARTMENT OF THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

PALOS VERDES SHORES MOBILE ESTATES,
LTD. and ALLAN WILK,
Appellants,
vs.
PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.
Superior Court No. CR A20457
NOTICE OF APPEAL TO THE SUPREME COURT OF
THE UNITED STATES
[Filed September 4, 1984.]

NOTICE OF APPEAL TO THE APPELLATE DEPARTMENT OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES:

NOTICE IS HEREBY GIVEN that Appellants, Palos Verdes Shores Mobile Estates, Ltd. and Allan Wilk, hereby appeal to

the Supreme Court of the United States from the final Judgment of the Appellate Department of the Superior Court of the State of California for the County of Los Angeles, entered on February 9, 1984, and which Judgment became final on June 21, 1984, affirming the Judgments of conviction rendered against Petitioners (People of the State of California v. Palos Verdes Shores Mobile Estates, Ltd., Allan Wilk and Harold C. Hohlman, L.A. Municipal Court Case No. 31118020) and upholding over Fourteenth Amendment challenge the statute under which the conviction was obtained.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

Dated: September 4, 1984.

Appendix F.

Supreme Court of the United States

No. A-154

PALOS VERDES SHORES MOBILE ESTATES, LTD. AND ALLAN WILK,

Appellants,

v.

CALIFORNIA

O R D E R

UPON CONSIDERATION of the application of counsel for the appellants,

IT IS ORDERED that the time for docketing an appeal in the above-entitled cause be, and the same is hereby extended to and including October 18, 1984.

/s/_____

William H. Rehnquist

Associate Justice of the Supreme Court of the United States

Dated this 10th day of September, 1984.

Appendix G.

LOS ANGELES RENT MORATORIUM ORDINANCE
No. 151,415
[Preamble omitted.]

THE PEOPLE OF THE CITY OF LOS ANGELES DO ORDAIN AS FOLLOWS:

Section 1. Purpose

Pending the outcome of certain State Supreme Court litigation involving Proposition 13 and further study of the development and adoption of measures to address the problems created by the present housing shortage, it is necessary to temporarily roll back rents and, on an interim basis for a period of 6 months from the effective date of this ordinance, to prohibit most rental increases on rental residential units within the City of Los Angeles.

Sec. 2. Definitions

A. Housing Services: Services connected with the use or occupancy of a rental unit including, but not limited to, repairs, replacement, maintenance, painting, light, heat, water, elevator service, laundry facilities and privileges, janitor service, refuse removal, furnishings, telephone, parking, and any other benefits, privileges or facilities.

B. Landlord: An owner, lessor, sublessor, including any person, firm, corporation, partnership, or other entity, entitled to receive rent for the use of any rental unit, or the agent, representative or successor of any of the foregoing.

C. Moratorium Period: The period of time beginning on the effective date of this ordinance and continuing for six months, or until such time as the City Council establishes a procedure for the adjustment and/or regulation of rents, whichever occurs first.

D. Rent: The consideration, including any bonus, benefits or gratuity demanded or received, for or in connection with the use or occupancy of a rental unit or the transfer of a lease for such a unit, including but not limited to monies demanded or paid for parking, for furnishings, for housing services of any kind, for subletting, or for security deposits for damages and/or for cleaning.

E. Rental Units: All dwelling units in the City of Los Angeles designed for rental use or actually rented at any time on or after June 1, 1977, including single family dwellings and mobile homes, together with the land and buildings appurtenant thereto, and all services, privileges, furnishings and facilities supplied in connection with the use or occupancy thereof, including garage and parking facilities.

* * * * * * * * *

Sec. 3. Rental Increase Moratorium and Rollback Provisions

A. Beginning on the effective date of this ordinance and continuing for a period of six months or until such time as Council establishes a procedure for the adjustment and/or regulation of rents, whichever occurs first, rents shall not be increased except as provided in Subsections B(3): (5) and (6) below.

B. During the moratorium period, the maximum rent for a rental unit in the City of Los Angeles shall be the following:

(1) For a rental unit which was rented as of May 31, 1978, and continued to be rented thereafter to one or more of the same persons:

The rent shall not exceed that in effect on May 31, 1978. The level of housing services provided to the rental unit on that date shall not be reduced during the moratorium period.

(2) For a rental unit which was not rented as of May 31, 1978, but was subsequently rented and continued to be rented to one or more of the same persons:

The rent shall not exceed that in effect on the date the rental unit is re-rented, after May 31, 1978 so long as such unit continues to be rented to one or more of the same persons. The level of housing services provided to the rental unit on the re-rental date shall not be reduced during the moratorium period.

(3) For a rental unit voluntarily vacated on or after June 1, 1978 and prior to the end of the moratorium period:

> If the vacancy was voluntary (i.e. not the result of an eviction, whether for just cause or otherwise, or of landlord refusal to renew a periodic tenancy or lease agreement), then the rent may be increased upon the re-rental of the rental unit. So long as such unit continues to be rented to one or more of the same persons, such rent shall not exceed that in effect on the date the rental unit is re-rented, nor shall the level of housing services provided on that re-rental date be reduced during the moratorium period.

* * * * * * *

Sec. 4. Violation of Ordinance

It shall be unlawful for any landlord to demand, accept, receive or retain any payment of rent in excess of the maximum lawful rents set forth in this ordinance. Any person violating any of the provisions, or failing to comply with any of the requirements, of this ordinance shall be guilty of a misdemeanor. Any person convicted of a misdemeanor under the provisions of this ordinance shall be punishable by a fine of not more than $500.00 or by imprisonment in the County Jail for a period of not more than six months, or by both. Each violation of any provision of this ordinance, and each day during which any such violation is committed, permitted or continued, shall constitute a separate offense.

* * * * * * * * *

Sec. 6. Severability

If any provision or clause of this ordinance or the application thereof to any person or circumstance is held to be unconstitutional or to be otherwise invalid by any court of competent jurisdiction, such invalidity shall not affect other ordinance provisions or clauses or applications thereof which can be implemented without the invalid provision or clause or application, and of this end the provisions and clauses of this ordinance are declared to be severable.

* * * * * * * * *

Appendix H.

RENT ROLL-BACK AND FREEZE ORDINANCE CASE PROCEDURES

I. INTAKE

A. *Initial review*: The Housing Services Division of the Community Development Department will submit all complaints to the Rent Roll-back and Freeze Ordinance coordinating attorney(s) assigned to the Central Trials Section (Tom Todd, extension 4578). These attorneys will review the complaints to determine whether the information satisfies the filing guidelines and will take one of the following actions:

1. *Return to agency*. The complaint will be returned to the Housing Services Division if it is defective as to form, or if further investigation is required. Examples of questions which may require further investigation include:

a. Does the landlord qualify for an exception provided in the ordinance?

b. Was the departure of the previous tenant of the rental unit voluntary?

c. Is the ownership of the rental unit in doubt?

2. *Refer for filing complaint*. When particularly "aggravated" circumstances are present, the case will be sent for filing of a complaint to the branch office for the area in which the rental unit is located. Examples of such circumstances include:

a. Prior office hearings or actions involving the landlord, based on violations of the ordinance.

b. The landlord is adamant in refusing to comply with the law.

3. *Refer for immediate hearing*. When certain aggravated circumstances occur and complaint filing requirements are satisfied, the case will be referred for an immediate hearing. A Request for Hearing form will be completed, specifying the issues to be addressed by the hearing officer, and the case will be sent to the hearing officers at the appropriate branch office. Examples of circumstances requiring immediate hearing include:

a. Evidence of harassment and/or extortion by the landlord or an agent (e.g., eviction notice, vandalism, annoying phone calls).

b. An excessive rent increase sought by the landlord ranging 50% or more above the May 31, 1978 rental.

c. The landlord has terminated essential "housing services" as defined in the ordinance.

4. *Refer case for standard hearing*. A Request for Hearing form will be completed, specifying the issues to be addressed by the hearing officer, and the case will be sent to the hearing officers at the appropriate branch office for hearing if the complaint filing requirements are met and the case does not present aggravated circumstances.

* * * * * * *

II. HEARINGS

C. *Dispositions*

1. *Recommended dispositions*. Hearing officers may recommend one of the following dispositions:

a. *Criminal Complaint*. If the respondent will not voluntarily comply with the ordinance and any evidentiary problems have been resolved by the hearing or aggravated circumstances appear at the hearing, the filing of a criminal complaint will be recommended.

b. *Off Calendar — Pending*. If the respondent agrees to comply with the ordinance, the hearing office will contact the complainant within fifteen days or after the next rent due date to verify compliance. If compliance has not occurred, the hearing officer may then recommend the filing of a criminal complaint. Hearing officers will give the complainant a business card in all such cases.

* * * * * * *

III. PROSECUTIONS

A. *Filing*

1. Criminal complaints in rent ordinance cases will be filed by the attorneys regularly assigned to complaint review duties at each branch office, applying the Office Crime Charging Standards and Filing Guidelines. A "flag card" will be attached to each case to notify trial attorneys of the special approval and reporting procedures required. (See Sample 5, attached.)

* * * * * * *

Appendix I.

RENT ORDINANCE FILING GUIDELINES

October, 1978

I. THE ORDINANCE

Los Angeles City Ordinance No. 151,415 declares it unlawful for any landlord to demand, accept, receive or retain any

payment of rent in excess of the maximum lawful rents set forth in the ordinance, or to reduce the level of housing services provided on certain dates set forth in the ordinance, during a six month period beginning on October 1, 1978. Violation of the ordinance is a misdemeanor with a maximum penalty of six months in the county jail or a fine of $500 or both.

II. STATEMENT OF POLICY

A criminal complaint alleging violation of Ordinance No. 151,415 will be filed only after efforts to achieve voluntary compliance have failed. In the absence of exceptional, aggravating circumstances, an alleged violation of the ordinance will be referred to an Office hearing before the filing of a criminal complaint. No complaint alleging a violation of the ordinance will be filed in the absence of evidence which satisfies the Crime Charging Standards and these Guidelines.

III. FILING GUIDELINES

A. An Office hearing referral or a criminal complaint alleging violation of Ordinance No. 151,415 requires presentation or all of the following:

1. address of rental unit;
2. name, current address and telephone number of complaining tenant(s);
3. name, address and telephone number of owner or other person or entity entitles to receive rent, or an agent or representative of the person or entity to receive rent; and
4. a summary of an interview of the owner or other person or entity entitled to receive rent or agent or representative in which such person is made aware of the nature of the complaint and does not agree to comply with the ordinance.

* * * * * * *

Appendix J.

[CR 10-Exh.D]

August 24, 1978

Dear Resident:

Effective November 1, 1978, all rents within the park are being increased $50.00 per month. Your rent at space number 1 will be $398.08. If you are alarmed, you have a right to be!

Your Los Angeles City Council, in its infinite wisdom, has just preliminarily imposed its version of rent controls. We feel this is unconstitutional and will fight them with all the resources we have, or more properly so, which *you* have! As you know, the tenant always pays the bill. Every six months hereafter your rent will be further raised until this political nonsense comes to an end. What your rents will be by that time, we just don't know. But, win or lose, we do know that they will be substantially higher than they would have been if some of your disgruntled neighbors, along with others, had not created this situation.

Naturally, these increases cannot in fact be collected from you until rent controls are lifted, either voluntarily by the Los Angeles City Council, by a court of law, or in some other fashion. Make no mistake, however! They will ultimately be lifted and the sooner the better for you.

Those of you who choose to voluntarily pay the rent which existed before the Los Angeles City Council's action will not be assessed this current $50.00 per month increase. Rather than pay your "rolled back" rent which the City Council has said you shortly will have a right to pay, you still live in a free society, or so we hope, and have a right to voluntarily pay the difference. In that case, the others in the park who still feel there is a "free lunch" out there somewhere will be the only ones ultimately paying our litigation expenses, and that's how it should be. The choice is yours!

PALOS VERDES SHORES
MOBILE ESTATES, LTD.

/s/_____

ALLAN WILK, General Partner

Appendix K.

[CR 10-Exh.J]

September 25, 1978

Dear Resident:

The Los Angeles City Council's rent control ordinance precludes us from according each of you the freedom of choice suggested in our letter of August 24, 1978. Accordingly, those of you entitled to pay a rolled-back rent as of October 1, 1978, have been so billed, with your invoice also indicating your current established rent, which as you know will increase November 1, 1978.

As we had mentioned earlier, we will next week file a series of lawsuits challenging the legality of this ordinance. Among other things, we feel it is discriminatory and confiscatory, and possibly more important for you, that it can only lead to higher ultimate rent levels within the park for any number of reasons. It is, in our opinion, politically motivated and has been nurtured by a group of malcontents who can see no further than the very shortest of terms.

For those of you who understand the necessity for business to operate at a profit, within the confines of a free enterprise system and unfettered by unnecessary bureaucratic intervention, you can make yourselves heard.

We have left copies of a petition to your City Council at the manager's Office which, if signed by a substantial number of you, should be cause for reflection by the Council about the wisdom of short-term thinking. No longer is there room or time to sit on the sidelines. You have a long-term investment to protect . . . not your neighbor's, not some politician's.

PALOS VERDES SHORES
MOBILE ESTATES, LTD.

/s/_____

ALLAN WILK, General Partner

Office - Supreme Court, U.S.
FILED
DEC 24 1984
ALEXANDER L. STEVAS,
CLERK

No. 84-632

In the

Supreme Court of the United States

OCTOBER TERM, 1984

ALLAN WILK AND PALOS VERDES SHORES MOBILE ESTATES, LTD.,
APPELLANTS
v.
PEOPLE OF THE STATE OF CALIFORNIA,
APPELLEE

ON APPEAL FROM THE APPELLATE DEPARTMENT OF THE SUPERIOR COURT, STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

Appellants' Brief in Opposition to Appellee's Motion to Dismiss or Affirm

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10PP

Table of Authorities Cited

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Charleston Federal Savings & Loan Ass'n v. Alderson, 324 U.S. 182 (1945) 5

Flournoy v. Wiener, 321 U.S. 253 (1944) 4

Furman v. Nichol, 75 U.S. (8 Wall.) 44 (1868) 4

Jacobellis v. Ohio, 378 U.S. 184 (1964) 6n

Jenkins v. Georgia, 418 U.S. 153 (1974) 4

Kern-Limerick, Inc. v. Scurlock, 347 U.S. 110 (1954) 6n

Wayte v. United States, No. 83-1292 (Nov. 6, 1984) 1, 2, 7

Wilson v. Black Bird Creek Marsh Co., 27 U.S. (2 Pet.) 245 (1829) 4

PROVISIONS

United States Constitution

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28 U.S.C. § 2103 3

MISCELLANEOUS.

Transcript of Oral Argument in Wayte v. United States, No. 83-1292 (Nov. 6, 1984) 2

No. 84-632

In the
Supreme Court of the United States

OCTOBER TERM, 1984

ALLAN WILK AND PALOS VERDES SHORES
MOBILE ESTATES, LTD.,
APPELLANTS

v.

PEOPLE OF THE STATE OF CALIFORNIA,
APPELLEE

ON APPEAL FROM THE APPELLATE DEPARTMENT OF THE
SUPERIOR COURT, STATE OF CALIFORNIA,
COUNTY OF LOS ANGELES

Appellants' Brief in Opposition to Appellee's Motion to Dismiss or Affirm

1. In light of the questions posed at oral argument in *Wayte* v. *United States*, No. 83-1292, on November 6, 1984, appellant respectfully suggests that the most appropriate disposition of this case is not to hold it pending the resolution of *Wayte* and then vacate it in light of whatever opinion is handed down there

(*see* JS at 28),[1] but simply to set this case down for plenary briefing and argument at the earliest available time. Several Justices asked during the *Wayte* argument how there could be a First Amendment problem if *all* non-compliers who turned themselves in, or were turned in by others, were given a full opportunity to avoid criminal prosecution by registering when formally "begged" to do so. (*See, e.g.*, Tr. of Oral Arg. at 15, 18, 19 (Stevens, J.); *id.* at 26 (O'Connor, J.).) How was free speech burdened or discriminated against unless the chance to comply, and thereby avoid prosecution for prior violations, was *withheld* from some non-compliers because of what they had said?

This is that case: whatever the situation in *Wayte*,[2] the "fast-track" exception to the beg policy in the Los Angeles Rent Moratorium Ordinance operated *precisely* to withhold the chance to comply, and thus escape criminal prosecution, on the basis of what the individual had *said* about the rent control provisions and their alleged application to his conduct.[3] Thus this case involves anything *but* the "elective prosecution" that the Solicitor General sought to depict *Wayte* as entailing (Tr. at 37): those who, like Mr. Wilk, said things the government deemed unreasonable were altogether *denied* the opportunity for elec-

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[1] References to the Motion to Dismiss or Affirm will be designated "MD" followed by the appropriate page number. References to the Jurisdictional Statement will be designated "JS"; and references to the Appendix to the Jurisdictional Statement will be designated "App."

[2] Counsel of record here, co-counsel for petitioner in *Wayte*, by no means concedes that petitioner there suffered no First Amendment violation.

[3] Unlike the failure to register for the draft that is involved in *Wayte*, and unlike a failure to comply with the handgun registration law hypothesized during oral argument in *Wayte* (Tr. at 44, 45 (Burger, C.J.)), violations of the rent moratorium were not "crimes without witnesses." The tenants who believed that they were being overcharged were always witnesses, and tenant complaints to the city Housing Office initiated nearly all investigations of rent moratorium violations.

tion between compliance and prosecution that *all others* routinely received.

2. Despite the thirty-day extension of time in which to file its Motion to Dismiss or Affirm, Appellee's motion offers no refutation whatsoever to the *merits* of Wilk's constitutional challenges to the Two-Track enforcement system under which he was singled out for immediate prosecution on the basis of his exercise of his First Amendment rights to speak freely and to petition the government for redress. Furthermore, although even an "improvidently taken" appeal "shall be regarded and acted on as a petition for writ of certiorari . . . duly presented to the Supreme Court at the time the appeal was taken," 28 U.S.C. § 2103, Appellee addresses only the posture in which Appellant's challenge to the validity of the *statute* reaches this Court (MD 7-9), saying literally nothing about whether the questions presented, if regarded as seeking review on certiorari, merit such review. Choosing a strategy of obfuscation, Appellee seeks to preclude this Court's review on appeal *and* on certiorari by obscuring the procedural posture of the case and the state of the record with a flurry of dubious and undocumented declarations.

3. Appellee first contends that Wilk's challenge to the Two-Track beg policy as a violation of the First and Fourteenth Amendments cannot be considered by this Court because "the trial court was never asked to pass on the constitutionality" of the beg policy during the pretrial hearing on Wilk's motion to dismiss the charges. (MD at 8-9.) But this appeal is, of course, taken from the decision of the Appellate Department of the Los Angeles Superior Court that affirmed Wilk's convictions, *not* from a ruling of the trial judge on a pre-trial motion to dismiss, or indeed from *any* ruling of the trial court. Nowhere in its motion does Appellee dispute that Wilk's First and Fourteenth Amendment challenges to the Two-Track System were adequately presented to and ruled upon by the state appellate court.

In any event, the appellate court clearly stated in its opinion: "Defendants argue that they should have been given an opportunity to comply with the Ordinance before charges were brought as this was the policy of the city. . . . It is true that Wilk in being outspoken against the Ordinance was exercising his First Amendment rights, but his adamant attitude also was a legitimate basis for not providing defendants" with the routine avoidance opportunity embodied in the official "beg policy." (App. 18-19.)[4]

In rejecting Wilk's constitutional objections to the Ordinance and its implementing guidelines and procedures, the court below obviously and necessarily decided the constitutionality of the Ordinance and its Two-Track System as construed and applied. "That is sufficient under [this Court's] practice." *Jenkins* v. *Georgia,* 418 U.S. 153, 157 (1974). *Cf. Furman* v. *Nichol,* 75 U.S. (8 Wall.) 44, 55-56 (1868). The jurisdictional requirement of 28 U.S.C. § 1257(2) calls "not for some abracadabra," *Flournoy* v. *Wiener,* 321 U.S. 253, 264-65 (1944) (Frankfurter, J., dissenting), but demands instead a commonsense assessment of the questions presented to the court below in express terms and by necessary implication. *See Wilson* v. *Black Bird Creek Marsh Co.,* 27 U.S. (2 Pet.) 245, 249 (1829). Where, as here, "it appears from the opinion of the state court . . . that a state statute was drawn in question, as repugnant to the Constitution, and that the decision of the court was in favor

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[4] Appellee unduly restricts its focus to the denial to Wilk of an *office hearing*, at which alleged violations of the Ordinance were discussed. The Jurisdictional Statement demonstrated in carefully documented detail — and Appellee does not deny — that Wilk was denied *every aspect* of the beg policy, including the routine office hearing *and* the formal letter providing a last clear chance to avoid criminal prosecution by prospective compliance. Wilk argued both in the appellate court and in his petitions for hearing (Petition, text accompanying nn. 14, 17, 22, 26, 28) or for writs of certiorari or mandate (Petition, text accompanying nn. 14, 17, 28) to the California Supreme Court that the Two-Track System denied him the benefits of the beg policy on the basis of his protected speech.

of its validity, [this Court] ha[s] jurisdiction on appeal. For we need not inquire how and when the question of the validity of the statute was raised when such question appears to have been actually considered and decided by that court." *Charleston Federal Savings & Loan Ass'n* v. *Alderson*, 324 U.S. 182, 185-86 (1945).

4. Appellee also contends that Wilk raises "for the first time" in the Jurisdictional Statement a *facial* challenge to the Ordinance's beg policy. (MD at 8-9, 10.) Appellee is mistaken, for *Wilk* has *never* attacked the Ordinance on its face. Appellant has, however, consistently attacked the Ordinance's enforcement policy as authoritatively *construed* and *applied* to him by the courts of California. (*See, e.g.*, JS at 17, 18 n.15, 22.) Appellee *does not deny* that the courts below did indeed construe and apply the Two-Track System in a manner that violates the First and Fourteenth Amendments.

5. The primary thrust of Appellee's Motion to Dismiss is an attempt to create a controversy over the record that Appellee evidently hopes would lead a burdened Court to decline plenary review of this case, whether under 28 U.S.C. § 1257(2) or under 28 U.S.C. § 1257(3). Appellee's first argument in this regard is that the constitutional challenges in the Jurisdictional Statement rely primarily on evidence which was entered into the record during Wilk's trial, but which was not considered by the appellate court in reviewing Wilk's conviction and which therefore may not be considered by this Court. According to Appellee, the only evidence this Court may consider is that adduced during the pre-trial hearing on the motion to dismiss. (MD at 3, 5, 11.) This contention is frivolous. Appellee has apparently forgotten that this appeal is taken not from the denial of a preliminary motion by the trial court, but from the decision of the Appellate Department of the Superior Court that affirmed Wilk's conviction and upheld the Two-Track System. That court stated, in the same paragraph wherein it began review of

Wilk's First Amendment challenge, that "[t]his court must review the *whole* record. . .." (App. at 18) (emphasis added.) Despite Appellee's understandable aversion to those portions of the record that indisputably establish the unconstitutionality of its beg policy (e.g., the trial record), that entire record is undoubtedly before this Court. Nothing in Appellant's citations to that record having been questioned with particularity by Appellee, the Court may safely disregard Appellee's conclusory and self-serving description of how this case appears "[a]fter due consideration is given to the factual record below." (MD at 11.)

6. The final — and the flimsiest — assertion offered by Appellee is that the Jurisdictional Statement rests upon a version of the facts in this case that is somehow unsupported by the record. (MD at 5-7, 9-11.) This cavalier and wholly undocumented assertion is Appellee's only response to the detailed and meticulously documented presentation of the case in the Jurisdictional Statement. If such unsupported characterizations were sufficient to side-step this Court's exercise of its appellate jurisdiction, prosecutorial retaliations for peaceful but outspoken opposition to government would go forever unreviewed and unremedied.

Fortunately, there is no need for this Court to undertake a tedious review of the facts in this case in order to see that Appellee's bald assertion deserves no weight.[5] Both the trial (App. 28-29) and appellate courts (App. 3, 5-6, 19) found that the decision to prosecute Wilk without affording him the benefits of

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[5] Of course, "the long course of judicial construction . . . establishes as a principle that the duty rests on this Court to decide for itself facts or constructions upon which federal constitutional issues rest." *Kern-Limerick, Inc.* v. *Scurlock*, 347 U.S. 110, 121 (1954). "[T]his has been particularly true where rights have been asserted under the First Amendment guarantees of free expression." *Jacobellis* v. *Ohio*, 378 U.S. 184, 189 (1964) (numerous citations omitted). Again, however, consideration of this case would entail no immersion into a tangled skein of facts.

the official beg policy was based on the facts that the prosecution considered Wilk's written and oral opposition to the Ordinance to be "adamant" and "outrageous" and that the prosecution deemed Wilk's legal position on the Ordinance to be "bizarre" and "specious." (JS 12-13, 24.)[6] In a moment of candor that Appellee would presumably prefer to ignore, the Criminal Branch attorney who was in charge of all rent control cases testified, without contradiction, that Appellant's alleged violations of the Ordinance were "not the sum total of the reasons for the filing of a [criminal] complaint against Mr. Wilk." (JS 13-14, 24-25.)[7]

Whatever the nitty-gritty facts, it bears emphasis that Appellee makes no effort whatsoever to deny — and indeed could not plausibly deny — that the appellate court below *expressly held* that the exercise of one's First Amendment rights to speak and to petition the government is a legitimate basis for denying an already identified non-complier the benefits of an official beg policy routinely afforded to all other non-compliers. (App. 18-19.) That undisputed fact alone is sufficient to warrant plenary review by this Court, given the undisputed importance of the issue presented, its palpable proximity to the questions already briefed and argued in *Wayte*, and its pivotal place in the problems of fairly enforcing criminal sanctions against businessmen who evidence a desire to comply with ambiguous economic regulations.

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[6] As the reference "RTM" in most of the record citations indicates, the vast majority of the facts on which the Jurisdictional Statement relies in fact come from the pre-trial hearing on the motion to dismiss — that part of the record that even Appellee agrees is properly before this Court.

[7] The testimony appears at RTM (1B) 27.

Conclusion.

For the foregoing reasons, the Motion To Dismiss Or, In The Alternative, To Affirm should be denied and this Court should either note probable jurisdiction or, treating this appeal as a petition for a writ of certiorari, should grant certiorari.

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No. 84-632

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

ALLAN WILK and PALOS VERDES SHORES MOBILE ESTATES, LTD.,
Appellants,

VS.

PEOPLE OF THE STATE OF CALIFORNIA,
Appellee.

On Appeal From the Appellate Department of the Superior Court, State of California, County of Los Angeles

MOTION TO DISMISS OR, IN THE ALTERNATIVE, MOTION TO AFFIRM

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No. 84-632

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MOTION TO DISMISS OR, IN THE ALTERNATIVE, MOTION TO AFFIRM

INTRODUCTION

Appellants stand convicted of violating the provisions of a Los Angeles city interim rent control ordinance which was in existence for seven months during the latter part of 1978 and the early part of 1979. Enacted by the City Council of Los Angeles, the purpose of this moratorium ordinance ("Ordinance") was to maintain the status quo vis-a-vis rent levels in Los Angeles, pending development and implementation of a permanent rent control ordinance.

Though the Ordinance provided for criminal penalties upon a violation of its provisions, compliance with the Ordinance was considered paramount. To that end, if it were clear that a particular landlord's failure to comply with the Ordinance was based upon his ignorance of its provisions, then procedures, including the possibility of an informal office hearing, were instituted to apprise the landlord of his obligations under the Ordinance. However, if it were clear that a landlord was familiar with the requirements of the Ordinance but was nevertheless violating its provisions, then the educational function served by the informal procedures would be superfluous, and criminal charges would be filed.

Of the ten criminal complaints that were filed alleging violations of the Ordinance, three were against landlords who, though fully aware of its provisions, were nonetheless charging rents in excess of those legally permitted. Appellant was one of these three.

Irrespective of appellants' contentions to the contrary, criminal charges were instituted without benefit of an office hearing because, in blatant disregard of provisions of the Ordinance of which Mr. Wilk ("Wilk") was clearly aware, he elected to collect illegal rents. The uncontroverted evidence presented to the trial court below reflects that Mr. Thomas Todd, the Deputy City Attorney having primary filing responsibilities, and his immediate supervisor, Mr. George Eskin, made the filing decision in this case based solely on this factor. The record contains no evidence to suggest, let alone support, appellants' baldfaced assertion that charges were filed against them based upon Wilk's vocal opposition to the Ordinance.

STATEMENT OF THE CASE

Appellants' statement of the case presented in the Jurisdictional Statement is seriously flawed. In addition to the considerable factual misrepresentations made, it

consists of a mix of facts that were both considered by the trial court at the pretrial motion to dismiss, as well as facts which were outside the record of that pretrial hearing and which were adduced at the trial on the merits which occurred at a subsequent point in time.

All of appellants' challenges to the Ordinance were made during the course of the pretrial hearing denominated a motion to dismiss. Accordingly, the facts which this Court should consider in ruling on appellant's claims are those facts presented to the trial court during this pretrial motion, and which were undisputed, or which were part of the express findings made by the trial court at this proceeding, or which are necessarily implied by the trial court's ruling on that motion. (*People v. Superior Court (Keithley)* (1975) 13 Cal.3d 406, 410; *Fidelity & Casualty Co. v. Abraham* (1945) 70 Cal.App.2d 776, 782; *People v. Manning* (1973) 33 Cal.App.3d 586, 601-603.) These are the facts considered by the Appellate Department of the Superior Court when reviewing the constitutional issues advanced by appellants at the pretrial motion. A statement of those facts appears in Appendix A of the Jurisdictional Statement at App. 1-10.[1] Because these are the only facts which the state courts considered when ruling on these issues, appellee incorporates by reference these selected pages from Appendix A into the instant pleading.

The pretrial motion to dismiss was instituted by appellants' filing their pleading entitled "Defendants' Pretrial Motion to Dismiss."[2] Filed in the trial court, it contained

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[1] References to documents contained in the appendix to the Jurisdictional Statement will be cited as "Appendix," followed by the letter designating the particular portion of the appendix and the page number of that portion, cited as "App."

[2] Relevant portions of this document are contained in the APPENDIX. References to this document will be cited as "APPENDIX, App.," followed by the number designating the appropriate page number.

the only constitutional arguments advanced by appellants and considered by the court below.[3]

The only constitutional claim advanced which is remotely related to any of those advanced before this Court was a claim that the City Attorney's Office was guilty of "purposefully and intentionally singling out individuals for disparate treatment on an invidiously discriminatory basis," thereby triggering the doctrine of discriminatory enforcement as articulated by the California Supreme Court in *Murgia v. Municipal Court* (1975) 15 Cal.3d 286, 297. Appellants summarized the issue as follows: "... regardless of the degree of protest to laws, it is improper criminally to prosecute an individual simply because he has exercised constitutional rights to protest laws he finds objectionable. That is the situation presented here; the proper remedy is dismissal of the action." (APPENDIX, App. 12.)

The only direct constitutional attack on the validity of the Ordinance was a vagueness argument phrased by appellants as follows: "The provisions of the ordinance relied upon to support these charges are void for vagueness." (APPENDIX, App. 3.) Appellants proceeded to argue that some of the language of the Ordinance lacks the clarity and certainty which is required of statutes imposing criminal liability.

---

[3] The only other pleading filed by appellants was entitled "Defendants' Rely to People's Opposition to Motion to Dismiss." This reply, however, contained no additional constitutional challenges not raised in their initial pretrial motion to dismiss. The record of the pretrial motion to dismiss reflects appellants' and the court's reliance on these pleadings. (See RTM (1A) 3.) Though appellants presented oral argument during the dismissal hearing, no additional constitutional theories or claims were advanced beyond those contained in their initial pleading. NOTE: References to the reporter's transcript of Appellants' Pretrial Motion to Dismiss will be cited as "RTM," followed by the appropriate transcript volume and page number.

These and the additional grounds advanced to support the claim that the complaint should be dismissed (see Appendix I, App. 2-3) were made during the course of the pretrial dismissal hearing conducted during the latter part of June 1982. This hearing was in no way connected with the subsequent trial on the merits. In particular, evidence adduced at the trial was not considered by the judge when he denied the pretrial motion to dismiss. It was only after the conclusion of this pretrial motion that the trial on the merits was held, at which time appellants were convicted of some of the alleged charges.

Significantly, though Wilk testified at trial, *he did not testify during the course of the pretrial motion to dismiss.* Since his testimony was considered neither by the trial court nor by the Appellate Department of the Superior Court when testing the validity of the trial court's refusal to dismiss the charges, likewise it should not be considered by this Court when ruling on appellants' constitutional claims.

By liberally sprinkling throughout the Jurisdictional Statement representations purportedly made by Wilk, conduct allegedly carried out by Wilk, and Wilk's state of mind during the course of the latter part of 1978 and early part of 1979 when criminal charges were contemplated and ultimately filed against him, appellants seek to present facts outside the record which are clearly inappropriate for consideration by this Court. In particular, all references made to the reporter's trial transcript, identified as "RT" in the Jurisdictional Statement, should never have been included in that statement and, for purposes of this Court's review of the facts presented to the state court, should be excised. (See Jurisdictional Statement, p. 6, n. 2.)

In addition to their including in the Jurisdictional Statement matters outside the trial court's record of the relevant proceeding, appellants as well grossly misstate

and "massage" facts which were properly considered by the trial court. What follows is an identification of some of the more egregious examples of these misrepresentations.

1. The rent ordinance filing guidelines and case procedures (Appendices H and I, App. 36, 38) were developed by the City Attorney's Office for internal use by the city's Housing Services Division and by attorneys responsible for filing criminal charges under the Ordinance. They were not a part of the Ordinance passed by the Los Angeles City Council, and the Los Angeles City Council had no role in their development or implementation. Clearly, these procedures and guidelines are not statutory law. (See, e.g., Jurisdictional Statement, p. iii.)

2. The undisputed evidence presented during the course of the pretrial motion reflects that the decision to file criminal charges against Wilk resulted from his clearly expressed intent to continue to violate the terms of the Ordinance notwithstanding his clear understanding of the requirements for compliance. Mr. Todd's decision to file charges, concurred in by his supervisor, Mr. Eskin, was based upon two primary sources of information: Todd had been in continual contact with the head of the tenants' association at the mobile home park and was provided with updated information concerning Wilk's conduct toward those tenants on a regular basis; and Todd had received and had carefully examined Wilk's letter of August 24th.[4] (Appendix A, App. 4; Appendix J, App. 40.) Whatever else Wilk had been doing to propel himself into the public's eye as an opponent of rent control, these factors were irrelevant to Todd and Eskin. (Appendix A, App. 5, 7.)

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[4]This letter and Wilk's September 25th letter were sent to the tenants who lived at Wilk's mobile home park. Though Wilk appears to have presented one or more copies of either or both letters to the City Council, they were addressed and sent to the tenants.

3. Appellant was one of three persons who were not accorded an office hearing prior to having criminal charges instituted against them. Since it was apparent that all three landlords were charging unlawful rents notwithstanding their awareness of the provisions of the Ordinance, conducting an office hearing in their cases to apprise them of the terms and conditions of the Ordinance would accomplish no meaningful purpose. Accordingly, Wilk's claim that he alone was singled out for disparate treatment is factually incorrect. (Appendix A, App. 3.)

ARGUMENT

I

THE SPECIFIC CONSTITUTIONAL CHALLENGES ADVANCED BY APPELLANTS TO THIS COURT HAVE NEVER BEEN PRESENTED TO THE STATE COURT AND ARE BEING PRESENTED TO THIS COURT FOR THE FIRST TIME. AS SUCH, THIS COURT'S JURISDICTION UNDER 28 U.S.C. SECTION 1257(2) CANNOT BE INVOKED.

This Court's well established rule provides that a constitutional question not presented to and not passed upon by the state court will be excluded from consideration when it is sought to be raised for the first time before this Court. (*White River Lumber Company v. Arkansas ex. rel. Applegate,* 279 U.S. 692, 700 (1928); *Adler v. Board of Education,* 342 U.S. 485, 496 (1952); *Wilson v. Cook,* 327 U.S. 474, 483-484 (1946).) A federal question neither raised nor passed upon in the state courts will not be considered by this Court. (*Cardinale v. Louisiana,* 394 U.S. 437, 438 (1969); *McGoldrick v. Compagnie Generale Transatlantique,* 309 U.S. 430, 434-435 (1940).)

In order to invoke this Court's appellate jurisdiction pursuant to 28 U.S.C. section 1257(2), there is the

additional requirement that a state court must have upheld the validity of a state statute against the very constitutional claim advanced on appeal to this Court. (*New York ex. rel. Bryant v. Zimmerman,* 278 U.S. 63, 67 (1928); *Adler v. Board of Education, supra,* 342 U.S. at 496.

Appellants leveled a facial attack against the Ordinance on vagueness grounds (APPENDIX, App. 3), and an attack against the allegedly discriminatory enforcement policy of the City Attorney's Office based on *Murgia v. Municipal Court,* 15 Cal.3d 286 (1975). (APPENDIX, App. 2, 4-12,). Evidence presented at the pretrial hearing related solely to this latter ground.[5]

The *Murgia* issue is qualitatively different from the issues advanced before this Court. Based on this Court's prior holdings in *Oyler v. Boles,* 386 U.S. 448 (1962), and *Two Guys v. McGinley,* 366 U.S. 582 (1961), *Murgia* condemns an enforcement scheme which intentionally singles out individuals for "disparate treatment on an invidiously discriminatory basis." *Murgia v. Municipal Court, supra,* 15 Cal.App.3d at 297. To support his claim that he was singled out for prosecution, Wilk presented four separate types of evidence:

> 1. Evidence that he was not provided prior notice or an office hearing;
>
> 2. Evidence that no demand letter had been sent to him;
>
> 3. Evidence that no other landlord was charged without a prior office hearing; and

---

[5]There was additional testimony presented to support appellants' claim that the Ordinance resulted in confiscatorily low rents. The confiscation issue, however, is not relevant to any issue before this Court.

4. Evidence that "the People broke their promise" to give him an office hearing. (APPENDIX, App. 2, 5-11.)

Thus, Wilk never alleged any constitutional infirmity with the office hearing procedure. His sole claim was that the failure to provide him an office hearing, when all other persons were provided one, is evidence that he was singled out for prosecution.

It is the singling out for prosecution — not the denial of the office hearing procedures — that formed the basis of Wilk's constitutional claim below. The trial court was never asked to pass on the constitutionality of the office hearing procedure; rather, it was argued that the prosecutor's failure to follow its own procedures *was evidence* that Wilk was singled out for prosecution.

On appeal to this Court, Wilk for the first time questions the facial validity, and the validity as applied to him, of the enforcement procedures used to file charges alleging violations of the Ordinance. Since these questions were never presented to the state court, pursuant to 28 U.S.C. section 1257(2) this Court lacks jurisdiction to consider them.

II

EVEN IF THERE WERE NO JURISDICTIONAL IMPEDIMENT, REVIEW OF THE ISSUES RAISED BY APPELLANTS IS NOT POSSIBLE SINCE THOSE ISSUES RELY UPON A STATE OF FACTS CONTROVERTED BY THE RECORD BELOW

The factual problems inherent in this case preclude review of the issues as framed by appellants. Clear from this Court's opinion in *Milk Wagon Drivers Union v. Meadowmoor Dairies,* 312 U.S. 287 (1941), is the rule that all factual disputes are to be resolved by the state courts; this Court will involve itself in a review of the facts only in certain extreme circumstances of which this

case is not one. In essence, this Court is "bound by the record on which [the state court] judgment is based." *Hedgebeth v. North Carolina* 334 U.S. 806, 807 (1948).

Both of the two claims advanced by appellants rely upon a very specific set of facts. Since the facts necessary to frame these issues are controverted by the record below, the factual record necessary before the issues can be considered by this Court does not exist.

The first issue presumes an enforcement system providing for prosecution, rather than the office hearing procedures, whenever there is vocal protest and objectionable public statements concerning the Ordinance. (See Jurisdictional Statement, "Questions Presented.") The internal guidelines and procedures do not support these factual assumptions.

Pursuant to these guidelines and procedures, the office hearing alternative to prosecution would be unavailable in certain situations, among them being when the "landlord is adamant in refusing to comply with the law." (Appendix H, App. 37). Nowhere on the face of either of the documents is there even the suggestion that one's outspoken opposition to the Ordinance will result in the filing of criminal charges.

Wilk's second claim is that he was denied the opportunity to be party to an office hearing solely because his protest to the Ordinance was deemed " 'outrageous' and 'bizarre' in content." (See Jurisdictional Statement, "Questions Presented") The uncontroverted evidence belies this assertion. The sole basis for the filing decision against appellants was Wilk's refusal to comply with the law. (Appendix A, App. 5, 7.) Wilk's letters of August 24th and September 25th (Appendices J, K, App. 40, 41) sent to his tenants, relied upon by Todd and Eskin, clearly support their conclusion. Far from evidencing any uncertainty as to the meaning of the Ordinance, these

letters establish beyond doubt that Wilk knowingly violated its provisions. Though Wilk later claimed when he testified at trial that he was outspoken and used many forums to rail against the Ordinance, these facts and his testimony were not presented during the pretrial motion to dismiss. Accordingly, they cannot provide the factual succor necessary in order for this Court to consider the issue.

III
THE ISSUES FRAMED BY THE FACTS ARE NOT SUBSTANTIAL

After due consideration is given to the factual record below, the only question which could be considered by this Court is whether it is constitutional for a prosecutor to base the filing decision on a likelihood that a violator, ignorant of the provisions of a local ordinance, will comply with the law after becoming aware of its terms. As applied to Wilk, the issue becomes whether any constitutional infirmity surrounded the filing of criminal charges against a person whose communications to his tenants left no doubt that he was fully aware of the applicable rent control ordinance, and yet who chose to violate its terms. Though a defendant cannot normally rely upon his ignorance of the law as a defense to criminal charges, there is no symmetry to this legal principle which precludes a prosecutor's use of a suspect's knowledge of the law when making the filing decision. The broad discretion residing in the executive branch, recognized by this Court in *United States v. Nixon,* 418 U.S. 683, 693 (1974), clearly allows a prosecutor to forego filing criminal charges against someone who committed the criminal act because of his ignorance of the law. Though the issues as framed by appellants may be more interesting than this issue, as previously argued they are not properly before this Court. And the only remaining question is not substantial, having been fully considered by this Court in *Nixon.*

CONCLUSION

The issues framed by appellant rely upon a set of facts never considered by the state court when ruling upon the constitutionality of the Ordinance. Combining misrepresentations of evidence presented at the pretrial motion with evidence never presented to nor considered at that hearing, the factual record relied upon by appellants when framing the issues before this Court cannot withstand even superficial scrutiny. As a result, the constitutional challenges purportedly made by appellants to the state courts were in fact never made, precluding review of these issues. The only remaining issue reflected by the actual facts presented to the court below involves a question of prosecutorial discretion already resolved by this Court. For these reasons, this Court should dismiss this appeal, or in the alternative, should affirm the decision of the state court below.

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APPENDIX

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In the Municipal Court of the State of California
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PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff,

v.

PALOS VERDES SHORES MOBILE ESTATES,
LTD., ALLAN WILK, HAROLD C. HOHLMAN,
Defendants.

DEFENDANTS' PRETRIAL MOTION TO DISMISS

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[Table of Authorities omitted.]
[Introduction omitted.]
[Irrelevant portions of argument omitted.]

III

THE PROSECUTION OF DEFENDANTS WAS SELECTIVE AND DISCRIMINATORY IN VIOLATION OF DEFENDANTS' CONSTITUTIONAL RIGHTS.

A. Summary of Controlling Authorities.

A criminal case should be dismissed in the pretrial stages when a defendant demonstrates "that he has been deliberately singled out for prosecution on the basis of some invidious criterion." *Murgia v. Municipal Court,* 15 Cal.App.3d 286 (1975). As *Murgia* explains: "[T]he equal protection guarantee simply prohibits prosecuting officials from purposefully and intentionally singling out individuals for disparate treatment on an invidiously discriminatory basis." 15 Cal.App.3d at 297.

To prevail on a defense of discriminatory prosecution, a defendant must establish two elements:

> "1) He must show that he has been singled out for prosecution while others similarly situated have not been prosecuted for conduct similar to that for which he was prosecuted;" [and]
>
> "2) He must show that the government's discriminatory selection of him for prosecution was based upon an impermissible ground, such as race, religion, or *his exercise of his first amendment right to free speech."* (Emphasis added.) *United States v. Catlett,* 584 F.2d 864, 866 (8th Cir. 1978). *People v. Battin,* 77 Cal.App.3d 635, *cert. denied sub nom. Battin v. California,* 439 U.S. 862 (1978).

Defendants submit that both requirements are met in this case. They will show that, of the 653 incidents investigated by the City Attorney's Office, no person has been criminally charged with a violation of the Moratorium Ordinance without a prior hearing on the alleged violation. Defendants will also show that the reason for this discrimination was Defendant Wilks' active political opposition to the Ordinance and Defendants' efforts to have the ordinance invalidated in a court of law.

United States v. Falk, 479 F.2d 616 (7th Cir. 1973) involved a protest of laws very similar to the protest staged by Defendants here. Falk was an active member of a draft counseling organization known as the Chicago Area Draft Resisters. At trial, he made an offer of proof (which was refused) that the government had stated to Falk's attorney that they knew of his draft counseling activities, that a good deal of their trouble in enforcing the draft laws came from people such as Falk, that few indictments were brought for non-possession of draft cards, and that defendant's draft-counseling activity was one of the reasons why the prosecution for non-possession was brought. *Falk,* 479 F.2d at 621. Falk's conviction was reversed for a hearing on this issue.

Falk also teaches that, in cases such as these, where Defendants have made a prima facie showing that their prosecution is the result of invidious discrimination, the burden is on the people to prove nondiscriminatory enforcement of the law. *Falk,* 479 F.2d at 621.

B. Evidence of Selective and Discriminatory Prosecution.

1. No prior notice or hearing.

It is and has always been the City's policy and practice to give landlords informal notice of complaints received and to hold informal hearings with alleged violators of rent control ordinances prior to the filing of any criminal charges.[23] The purpose of such hearings was to air any differences of misunderstandings between the City and landlords concerning interpretation and application of the ordinances, and to give landlords a chance to conform to the law's requirements without criminal prosecution.[24] No such informal notice or hearing was given in this case. In fact, Defendants were not even interviewed prior to the filing of the complaint.[25]

The lack of notice to Defendants and the failure to provide an office hearing is a clear violation of the City

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[23]*See, e.g.*, Exhibit X* (newspaper articles discussing use of hearing procedure), Exhibit Y* (which includes the "Rent Roll-Back and Freeze Ordinance Case Procedures", documents to be mailed to the landlord re alleged violations, special forms to track the cases through the hearing process, and the "Rent Ordinance Filing Guidelines"), Exhibit Z* (entitled "Landlord Reply Form"), Exhibit AA* (documents from an actual case, including: Community Development Department form advising landlord that tenant has filed a complaint; City Attorney form entitled "Request For Office Hearing; and completed Landlord Response to A Tenant complaint"); and Exhibit BB* (documents from the file of one of the sixteen landlords who actually were prosecuted under the Ordinance, including letter from City Attorney requesting landlord's attendance at an office hearing and completed Landlord Reply Form.)

[24]*See, e.g.*, September 29, 1978 letter from City Attorney Burt Pines to Councilman Joel Wachs, at page 2. (A copy of this letter is attached as Exhibit CC* of Defendants' Pretrial Exhibits.) *See also* Exhibit X* of Defendants Pretrial Exhibits.

[25]*See* Exhibit W, at page 1.

Attorney's own written policy regarding tenant reports of possible violations of the rent control laws. *See* "Rent Roll-Back and Freeze Ordinance Case Procedures", Exhibit Y* of Defendants' Pretrial Exhibits. The only circumstances authorizing the City Attorney's Office to disregard the notice and hearing procedures and to file a complaint without a hearing involved so-called "aggravated" cases. The City Attorney's own "Case Procedures" defined an "aggravated" case as one in which (1) prior office hearings had already been held with the landlord or (2) the landlord was adamant in refusing to comply with the law. Neither of the two defined aggravated circumstances existed in the case at bar.

Lack of informal notice and of a hearing is particularly significant here for had these established procedures been followed, they may well have accomplished what they were intended to do — resolve the dispute without courtroom proceedings. For example, when the Ordinance was originally enacted, it did not apply to the rental of mobilehome ground spaces; it was later amended to cover such rentals. Some of the counts filed were for conduct before the Ordinance was so amended. When this was pointed out, those counts were dismissed. Moreover, after the complaint was filed, rent refunds were voluntarily made by Defendants to the affected residents.[26] The remainder of the charges could well have been similarly resolved in the hearing process. this seems particularly true of the courts which involve such questions as whether the golf course next to the park is an "essential housing service" and thus subject to rent control.

What was the reason, then, for the lack of informal notice and hearing that everyone else received? Notes by

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[26]Test at p. 16 *supra*. *See e.g.*, Exhibit R of Defendants' Pretrial Exhibits.

Deputy City Attorney Susan Pfann of her conversation with Deputy City Attorney Thomas Todd record Mr. Todd as saying that no hearing was given to Defendants because no matter what they said "we would file anyway."[27] These notes reflect Mr. Todd as stating that Defendant Wilk was "flaunting" the law and "knew" his conduct was unlawful. To our knowledge, Defendants had never heard of Mr. Todd before the criminal complaint was filed and of course had never had an opportunity to discuss the alleged violations with Mr. Todd. How then could Mr. Todd have concluded that Defendants were "flaunting" the law and how could Mr. Todd legitimately claim that Wilk "knew" he was violating the Ordinance? Even assuming the truth of Mr. Todd's wholly uninformed assumptions, why would he have prosecuted "anyway", particularly if after a hearing, Defendants had agreed to comply with the City's interpretation of the Ordinance and to make restitution?

Defendants can think of no reason for these decisions by the City Attorney's Office other than the expressed desire to punish Defendants for actively and publicly expressing their views in opposition to rent control and challenging the Ordinance in court. The law is clear that such prosecutions violate the First and Fourteenth Amendments and are unconstitutionally discriminatory.

2. **No demand letter.**

It is also the practice of the City Attorney, even in egregious cases, to send a compliance letter to a suspected violator of the rent control law, asking them to correct the asserted irregularity. An example of such a letter is attached as Exhibit EE* of Defendants' Pretrial Exhibits. Defendants were never sent a compliance letter.

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[27]A copy of Ms. Pfann's notes of her conversation with Mr. Todd is attached as Exhibit DD* of Defendants' Pretrial Exhibits.

This failure to follow a procedure that was used with every other suspected violator is further evidence of wrongful motive by the prosecution.

3. No other landlord was charged without a prior office hearing.

Defendants believe that no other landlord was criminally charged with violation of the Ordinance absent a prior office hearing. During discovery, the City Attorney was asked if anyone else was charged without a hearing. They responded that there *may* have been two other cases in addition to this one where no hearing was held.[28] However, the files on these two other cases either do not exist or have been "lost."

4. The People broke their promise to give Defendants a hearing.

This case presents the outrageous situation where Defendants first sued the City seeking to invalidate a novel ordinance, and then the City turned around and brought criminal charges for violation of the challenged Ordinance. (As is demonstrated in Section V *infra,* the law prohibits such prosecutions.) On October 2, 1978, Defendants brought civil suit challenging the Moratorium Ordinance as violative of the due process and other constitutional guarantees. The City Attorney represented the City of Los Angeles in that action. On February 26, 1979, the City filed this instant criminal action against these Defendants. At present, there is no direct evidence that this filing was in retaliation for Defendants' civil declaratory relief action, but, in view of the facts previously discussed, this conclusion is certainly a logical and permissible inference.

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[28] *See* Exhibit W of Defendants' Pretrial Exhibits, at p. 2, ¶ 4. *See also* Exhibit DD*.

Moreover, at the hearing on the request for a temporary restraining order in the civil case, Deputy City Attorney Claudia McGee Henry promised the Court that no criminal charges would be filed against these Defendants without a prior informal hearing. As the People now admit, no such hearing was afforded these Defendants. *See* Exhibit W, at p. 1, ¶ 1 (c.).

Finally, Exhibit FF of Defendants' Pretrial Exhibits is a copy of an article that appeared in the Los Angeles Times on October 14, 1981 and Exhibit GG is a copy of the first and fourth pages of a report of the Community Development Department to The Governmental Operations Committee of the Los Angeles City Council dated April 11, 1980. Both of these exhibits cite statistics which indicate that the City's standard practice is to afford notice and an informal hearing to suspected violators of the rent control ordinances prior to filing criminal charges, and that 98% of all such cases are resolved through these hearings. Under the circumstances, where there is a policy to conduct informal hearings on suspected violations of the rent control laws prior to criminal action, and a specific promise was made by the City Attorney that this procedure would be followed, the evidence is overwhelming that this prosection was undertaken to punish Defendants for exercising their constitutional rights to oppose rent control politically and challenge such legislation in court.

C. **Conclusion**

Whenever an individual protests a law, he draws attention to himself, and often times is subjected to close government scrutiny. The protest may seem relatively insignifiant, as where a citizen refuses to disclose information to a census taker. *See U.S. v. Steele,* 461 F.2d 1148 (9th Cir. 1972) (where a defendant's conviction for refusing to answer questions on a census form was

reversed because it appeared the government maintained a file on defendant's public opposition to the census process). Or such protest may generate more notoriety, as organized resistance does to induction into the armed forces. *United States v. Falk,* 479 F.2d 616 (7th Cir. 1973). But regardless of the degree of protest to laws, it is improper criminally to prosecute an individual simply because he has exercised constitutional rights to protest laws he finds objectionable. That is the situation presented here; the proper remedy is dismissal of the action.

[Remaining Arguments omitted.]